Supreme Court, U.S.
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No. 00-____

IN THE

Supreme Court of the United States

MOBIL MINING & MINERALS,

Petitioner,

v.

DAVID R. NIXSON AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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78 ppt f/o

QUESTION PRESENTED

Whether, when any part of a manufacturing facility is used for loading or unloading vessels, the entire facility, including non-maritime areas, is "customarily used" for such purposes and thus is a covered situs under Section 3(a) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 903(a)?

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE

The following were parties to the proceeding in the court of appeals: Mobil Mining & Minerals, Insurance Company of the State of Pennsylvania, David R. Nixson, and Director, Office of Workers' Compensation Programs, U.S. Department of Labor.

Mobil Mining and Minerals is a division of Mobil Business Resources Corp., which is a wholly-owned subsidiary of Mobil Corporation. All of the stock of Mobil Corporation is, in turn, owned by Exxon Mobil Corporation, a publicly held company.

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PETITION FOR A WRIT OF CERTIORARI

Mobil Mining & Minerals ("Mobil") respectfully petitions this Court for a Writ of Certiorari to review a judgment of the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit, in accord with the First Circuit and in conflict with the Fourth Circuit, held that whenever part of a manufacturing facility (*e.g.*, a dock) is used for loading or unloading vessels, the entire facility is "customarily used" for such purposes and thus is a covered "situs" under § 3(a) of the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 903(a). Certiorari should be granted to resolve the conflict among leading maritime-law circuits on this issue, which results from uncertainty about the scope and effect of this Court's prior decisions interpreting the LHWCA, and which undermines Congress' goal of establishing a uniform compensation structure by subjecting employers and

employees to different coverage rules in different parts of the country.

OPINIONS BELOW

The opinions of the court of appeals, Appendix ("App.") 1a-2a, the Benefits Review Board, App. 3a-8a, and the administrative law judge, App. 9a-35a, are unreported.

JURISDICTION

The decision of the court of appeals was filed on February 7, 2000. Mobil's petition for rehearing was denied on April 7, 2000. App. 36a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 901-950, provides in pertinent part:

> Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel.)

Id. § 903(a).

STATEMENT OF THE CASE

Facts Giving Rise To This Case

Mobil Mining and Minerals ("Mobil") operates a fertilizer manufacturing plant in Pasadena, Texas, on the southern shore of the Houston Ship Channel. The raw materials used to make fertilizer – phosphate rock, ammonia, and sulfuric acid – arrive at the plant by truck, rail, and barge. App. 15a. Finished fertilizer products leave the plant primarily by rail and truck, and to a limited extent by barge and ship. App. 4a, 20a.

When raw materials arrive at Mobil's manufacturing plant by vessel or barge, they are never loaded directly onto a rail car or a truck. Conversely, when raw materials come into the plant by rail or truck, they are never loaded directly onto a vessel or barge. Rather, "[e]verything goes into the plant to be processed." Tr. 106-07.[1] Mobil's plant, therefore, is not a "trans-shipment place" or an "intermodal or cargo shipment depot." Tr. 108.

Mobil's plant has four docks at which barges may be either loaded or unloaded. App. 14a. Respondent Nixson, however, was not injured on (or even near) any of these docks. Rather, he was injured at the inland junction of the manufacturing plant's two railroad tracks. The rail line is separated from the waterfront by a road, several large warehouse buildings, and a rock storage tank. App. 14a; Exh. CX-11 (plant map, reprinted following App. 49a).

Nixson was injured when his arm was unexpectedly caught in the coupling between two empty rail cars. App.

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[1] "Tr." refers to the transcript of the hearing before the administrative law judge.

20a. Nixson was not loading or unloading the rail cars at the time of his injury; indeed, rail cars were never loaded or unloaded in the area where Nixson's injury occurred. Tr. 110. Instead, Nixson was "attempting to couple cars together for purposes of pushing them back to the storage tracks when his accident occurred." App. 20a.

After his injury, Nixson promptly received state workers' compensation and medical benefits. App. 11a-12a. Nixson returned to Mobil approximately ten months after his accident, working as a laboratory technician. App. 12a.

Administrative Proceedings

Nixson filed a claim for benefits under the LHWCA. App. 10a. Mobil defended by challenging the applicability of the Act, contending that the injury did not occur on a statutorily covered "situs." Specifically, Mobil contended that the rail line where Nixson was injured does not "adjoin[]" navigable waters and is not "customarily used by the Employer to load and unload vessels." App. 24a.[2] Rejecting Mobil's focus on the rail line as the specific site of Nixson's injury, the administrative law judge ("ALJ") "conclude[d] that *Employer's facility* is in the vicinity of navigable waters and is used to load and unload vessels." App. 27a-28a (emphasis added). The ALJ expressly rejected Mobil's contention that a "manufacturing area[] having [its] own docking facilities" should not be considered an "adjoining area" that is "customarily used" for loading and unloading vessels within the meaning of § 3(a). App. 26a. In so holding, the ALJ disapproved "the Fourth Circuit's

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[2] Mobil also argued that, at the time of his injury, Nixson was not engaged in "maritime employment" within the meaning of LHWCA § 2(3), 33 U.S.C. § 902(3); however, Mobil dropped this "status" argument on appeal before the Fifth Circuit.

restrictive construction of the situs requirement," App. 26a, which is discussed in detail below, *see infra* pages 9-10.

The Benefits Review Board ("BRB") noted Mobil's argument that the ALJ "erred in concluding that its *entire facility*, including the rail line where claimant was injured, is a covered situs under the Act," App. 6a (emphasis added), but nonetheless affirmed the ALJ's decision "for the reasons set forth in" an earlier decision involving Mobil's fertilizer plant, *Gavranovic v. Mobil Mining and Minerals*, 33 B.R.B.S. 1 (Feb. 23, 1999), App. 7a. In *Gavranovic*, the BRB "decline[d] to impose the more restrictive law established by the United States Court of Appeals for the Fourth Circuit." App. 44a-45a. Instead, relying on the Fifth Circuit's controlling decision in *Texports Stevedore Co. v. Winchester*, 632 F.2d 504 (5th Cir. 1980) (en banc), the Board explained that while a site must have some "maritime nexus" to be "considered a covered situs," "it need not be used exclusively or primarily for maritime purposes." App. 43a. Referring specifically to Mobil's fertilizer plant, the Board held that "[a]lthough the facility ... is a manufacturing operation, and the [specific site at] which [claimants] were injured is not directly involved with the loading or unloading of barges or vessels, *part* of employer's business involves sending and receiving goods by barges or vessels – a distinctly maritime activity." App. 47a (emphasis added). Accordingly, "because significant maritime activity (loading and unloading barges) occurs *on the docks* at [Mobil's] facility," the Board held that Mobil's *entire facility* – most of which is never used in loading or unloading barges – is "customarily used" for such purposes within the meaning of § 3(a). App. 47a (emphasis added).

The Decision Of The Fifth Circuit

The Fifth Circuit affirmed in a brief unpublished decision.[3] The Fifth Circuit followed what it called the "seminal case in th[at] court, *Texports Stevedore Co. v. Winchester*, 632 F.2d 504 (5th Cir. 1980) (en banc)." App. 2a. While acknowledging that "the pinpoint site of the accident" (the rail line) was not a covered situs within the meaning of § 3(a), the court held that the "area constituting *Mobil's facility*" was a covered situs. App. 2a (emphasis added). The Fifth Circuit subsequently denied Mobil's petition for rehearing.

REASONS FOR GRANTING THE WRIT

This Court has not hesitated to grant certiorari in order to resolve "conflict[s] over the coverage afforded by the 1972 Amendments" to the LHWCA. *Caputo*, 432 U.S. at 256. This case presents just such a conflict. Section 3(a)'s "catch-all" clause extends coverage under the LHWCA to "adjoining area[s] customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel." What does it mean for an "adjoining area" to be "customarily used" for loading, unloading, repairing, dismantling, or building a vessel? In the absence of a definitive construction by this Court, the courts of appeals have reached very different conclusions.

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[3] The Fifth Circuit had jurisdiction pursuant to 33 U.S.C. § 921(c).

I. THE FIFTH CIRCUIT'S DECISION PERPETUATES A CIRCUIT CONFLICT OVER THE MEANING OF THE PHRASE "CUSTOMARILY USED" IN THE LHWCA.

A. The Circuits Are Split On The Issue Whether, When Part Of A Manufacturing Facility Is Used For Loading Or Unloading Vessels, The Entire Facility Is "Customarily Used" For Such Purposes.

1. Prior to 1972, coverage under the LHWCA turned on whether an injury occurred "upon the navigable waters." In 1969, this Court confirmed that longshore workers injured on navigable waters (or on ships) were covered under the LHWCA, but longshore workers injured on adjacent piers or wharves were not. *See Nacirema Operating Co. v. Johnson*, 396 U.S. 212, 223-24 (1969); *see also Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 259 (1977) ("[T]he Court made it clear that federal coverage stopped at the water's edge."). "As a consequence, longshoremen continually walked in and out of LHWCA coverage as they walked up and down the gangplank from ship to shore during the loading and unloading of vessels." *Sidwell v. Express Container Servs., Inc.*, 71 F.3d 1134, 1135 (4th Cir. 1995), *cert. denied*, 518 U.S. 1028 (1996). Notwithstanding the "anomal[y] inherent in a system that drew lines at the water's edge," *Caputo*, 432 U.S. at 281, this Court declined "[t]he invitation to move [the coverage] line landward," declaring that such an invitation had to be "addressed to Congress," *Nacirema*, 396 U.S. at 224.

In 1972, Congress responded to *Nacirema* by amending LHWCA § 3(a) to cover not only injuries occurring "upon the navigable waters" but also injuries occurring on "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area

customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel." Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972 § 2(c), Pub. L. No. 92-576, 86 Stat. 1251, 1251 (Oct. 27, 1972). In addition to this broadened "situs" test, Congress added a "status" requirement, which limited coverage to persons "engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker ...." *Id.* § 2(a).

2. As explained above, the ALJ, the BRB, and the Fifth Circuit held that because *part* of Mobil's manufacturing facility (namely, the dock area) is used for loading and unloading barges, the *entire manufacturing facility* – including a rail line that was never used for loading or unloading – is "customarily used" for maritime purposes within the meaning of § 3(a).[4] In so holding, the Fifth Circuit joined the First Circuit, which has also found the situs requirement met in a case involving employees injured in non-maritime areas of a manufacturing plant because the plant had docks that were used for loading and unloading ships.

In *Prolerized New England Co. v. Benefits Review Board*, 637 F.2d 30 (1st Cir. 1980), the First Circuit encountered a case very much like this one and decided it in like fashion. Prolerized operated a "scrap metal business" in Everett, Massachusetts, alongside the Mystic River. *Id.* at 33. Like Mobil's fertilizer plant, Prolerized's manufacturing

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[4] Because the rail line where Nixson was injured was never used in connection with loading or unloading vessels, it is very different from the rail line at issue in *Chesapeake and Ohio Railway Co. v. Schwalb*, 493 U.S. 40 (1989).

facility "ha[d] its own shiploading equipment and dock." *Id.* And, like Nixson, the claimant in *Prolerized* was injured while working on a piece of equipment that was not used to load or unload vessels and did not itself adjoin the water but, instead, was located "1000 feet from the water's edge." *Id.* at 38.

Notwithstanding the facts (1) that Prolerized's plant, like Mobil's, was neither a shipyard nor a terminal but rather a manufacturing facility that "created from raw material a recognizably different product," *id.* at 36, and (2) that, "viewed functionally," the specific piece of equipment on which the claimant was injured was "far removed from the loading of ships," *id.* at 38, the First Circuit held that Prolerized's entire facility was a covered situs. In so holding, the *Prolerized* court relied on this Court's decision in *Caputo*, 432 U.S. 249, which, as the First Circuit read it, "made clear that a covered 'adjoining area' need not be entirely devoted to shiploading" in order to be considered "customarily used" within the meaning of § 3(a). 637 F.2d at 38 ("[T]he Court [in *Caputo*] held an entire terminal facility covered when one of its two finger-piers was used to load and unload vessels."). The First Circuit adopted a "similarly expansive" approach to § 3(a) in *Prolerized* and held that, although the employer's plant was a manufacturing facility and not a "terminal," because part of that facility (*i.e.*, the dock) was used for shiploading and unloading, the entire facility – including the non-maritime-related piece of equipment on which the claimant was injured – was "customarily used" for purposes of § 3(a). *See id.* at 39.

3. The view of the First and Fifth Circuits – that so long as any part of a manufacturing facility is used for maritime purposes the entire facility is a covered situs – conflicts with the Fourth Circuit's interpretation of the LHWCA as expressed in *Jonathan Corp. v. Brickhouse*, 142 F.3d 217 (4th Cir.), *cert. denied*, 525 U.S. 1040 (1998). The

facility at issue in *Brickhouse* was a "steel fabrication plant" which, like Prolerized's and Garvey's plants – and like Mobil's plant here – was situated on a navigable waterway and "ha[d] a dock for loading barges." *Id.* at 218-19. Unlike the First and Fifth Circuits, however, the Fourth Circuit refused in *Brickhouse* to conclude that, simply because part of the manufacturing facility might be used for loading and unloading ships, the whole facility is "customarily used" for maritime purposes and thus a covered situs under § 3(a).

Instead, hewing closely to the text of § 3(a), the Fourth Circuit observed that the situses expressly enumerated in the text – piers, wharves, dry docks, terminals, building ways, and marine railways – are all "facilities customarily used by longshoremen in loading and unloading ships and in repairing or building them." *Id.* at 221. Applying traditional interpretive canons, the court held that the "other areas" referred to in § 3(a)'s catch-all clause likewise "must be for the loading or unloading of cargo onto ships in navigable waters, or for the 'repairing, dismantling, or building' of those ships." *Id.*; *accord Sidwell*, 71 F.3d at 1139 ("[A]n 'other adjoining area' as to which coverage extends must be like a 'pier,' 'wharf,' 'dry dock,' 'terminal,' 'building way,' or 'marine railway.'"). Specifically, the *Brickhouse* court held that to be covered, these "other area[s]" must be "discrete structure[s] or facilit[ies], the very raison d'être of which is [their] use in connection with navigable waters." *Id.* (quoting *Sidwell*, 71 F.3d at 1139). Thus, notwithstanding the facts that the plant property adjoined a river and that part of the plant (*i.e.*, the dock) was used for loading and unloading barges, the Fourth Circuit held that "the steel fabrication plant where [claimant] was injured was not a facility, the 'raison d'être of which is its use in connection' with the nearby navigable waters" and, therefore, was not a statutorily covered situs. *Id.* at 222.

4. In sum, the First and Fifth Circuits have held that so long as a single part of a manufacturing facility (*e.g.*, a dock) is used for maritime purposes, the entire facility is considered to be "customarily used" under § 3(a). The Fourth Circuit, in contrast, requires that a covered facility – not a part of the facility, but the facility itself – be one the "the very raison d'être of which is its use in connection with navigable waters." This Court should grant certiorari to resolve this conflict.

B. The Circuit Conflict Arises, At Least In Part, From Uncertainty About The Scope Of This Court's Decisions.

1. In *Caputo*, this Court was faced with the question whether a claimant (Blundo) was injured on a covered situs when he slipped on a pier located within a shipping terminal in Brooklyn:

> Blundo's injury was sustained while he was checking a container being stripped on a pier located within a facility known as the 21st Street Pier. The fenced-in facility was located on the water and ran between 19th and 21st Streets. It included two "finger-piers." The pier on the 21st Street end was used to berth ships for purposes of loading and unloading them. The one on the 19th Street end was used only for stripping and stuffing containers and storage. Blundo was working on this latter pier.

432 U.S. at 279-80 (citations omitted).

The employer in *Caputo* argued that Blundo was not on a covered situs when he was injured because the specific site of his injury – the 19th Street pier – "was not

'customarily used by an employer for loading [or] unloading ... a vessel.'" *Id.* at 280. This Court rejected the employer's contention. First, the Court noted that Blundo was injured on the 19th Street pier while "stripping" and "stuffing" shipping containers, and observed that "[s]tripping a container ... is the functional equivalent of sorting cargo discharged from a ship [and] stuffing a container is part of the loading of the ship even though it is performed on shore and not in the ship's cargo holds." *Id.* at 270-71 (quoting *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 53 (2d Cir. 1976) (Friendly, J.)). Second, and more significantly for present purposes, the *Caputo* Court concluded that because "one of the two finger-piers clearly was used for loading and unloading vessels," the "entire terminal facility" – including the non-maritime-related pier on which Blundo was injured – was "customarily used" and was thus a covered situs under § 3(a). *Id.* at 281.

2. The First Circuit in *Prolerized* relied on *Caputo* in concluding that the injury there at issue occurred on a covered situs. By holding "an entire terminal facility covered when one of its two finger-piers was used to load and unload vessels," the First Circuit thought *Caputo* "made clear that a covered 'adjoining area' need not be entirely devoted to shiploading" in order to be considered "customarily used" under § 3(a). *Prolerized*, 637 F.2d at 38. The Fourth Circuit in *Brickhouse*, on the other hand, did not consider itself bound by *Caputo*. Notwithstanding the fact that a distinct part of the facility in *Brickhouse* – namely, the barge dock – was used for loading and unloading vessels, the court concluded that the injury did not occur on a covered situs because the manufacturing plant *viewed as a whole* was not a "facility the very raison d'être of which is its use in connection with navigable waters." 142 F.3d at 222.

3. The Fourth Circuit was correct to distinguish *Caputo*. As an initial matter, this Court's suggestion in

Caputo that a discrete part of a terminal could render the entire terminal facility "customarily used" for purposes of § 3(a) was dictum. The *Caputo* Court first expressed grave doubt that "the phrase 'customarily used' was intended to modify more than the immediately preceding phrase 'other areas.'" 432 U.S. at 280.[5] The Court's indication that the 21st Street pier somehow made the whole terminal – and, hence, the 19th Street pier – a covered situs proceeded only on the "assum[ption]" that the phrase "customarily used" could also "be read to modify the preceding terms" such as "terminal" and "pier." *Id.* at 281.

It is not at all clear that the rationale of *Caputo* – that whenever part of a facility is "customarily used" for maritime purposes the entire facility is likewise "customarily used" – extends to a case like this one (and like *Prolerized*, *Garvey*, and *Brickhouse*) where the facility at issue is not a shipping "terminal" (as in *Caputo*) but rather a manufacturing plant. Quite unlike a manufacturing plant, a "terminal" is a situs specifically enumerated in § 3(a) along with "pier," "wharf," "dry dock," "building way," and "marine railway." A "terminal," like the other specifically enumerated structures and facilities, is by its very nature related to maritime activity – in the Fourth Circuit's parlance, it is a "facility the very raison d'être of which is its use in connection with navigable waters."

Thus, it is not the least bit unnatural to conclude that Blundo's injury – occurring as it did within the confines of a

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[5] Lower courts have followed *Caputo*'s suggestion and have held that specifically enumerated structures, such as "terminals," need not be "customarily used" in order to qualify as maritime situses under § 3(a). *See, e.g.*, *Fleishmann v. Director, OWCP*, 137 F.3d 131, 138-39 (2d Cir.), *cert. denied*, 525 U.S. 981 (1998); *Hurston v. Director, OWCP*, 989 F.2d 1547, 1552 (9th Cir. 1993).

shipping "terminal" – occurred on a maritime situs. It is quite another matter, however, to conclude that Nixson's injury, which occurred in a non-maritime area of a fertilizer manufacturing plant located a considerable distance from the water, likewise occurred on a maritime situs. Under the rule adopted by the First and Fifth Circuits, every manufacturing plant that happens to have a shipping and receiving dock is transformed – *in toto* – into a maritime situs for purposes of § 3(a), even if the core operations of the plant involve manufacturing rather than traditional maritime activity.

4. It is questionable whether the "part-therefore-whole" rationale of *Caputo* has survived subsequent decisions of this Court. In relying on *Caputo* to extend LHWCA coverage to the entire scrap metal processing facility before it, the First Circuit in *Prolerized* stated that "[a] crazy quilt pattern of situs coverage tracking the indistinct line between Prolerized's manufacturing and loading operations would produce uncertainty and confusion for employers and employees alike." 637 F.2d at 39. The *Prolerized* court's *Caputo*-based justification for its sweeping situs definition has been overtaken by the teaching of this Court's decision in *Herb's Welding, Inc. v. Gray*, 470 U.S. 414 (1985). There, this Court dismissed as "not ... compelling" a similar argument that "denying coverage to someone in [claimant's] position will result in exactly the sort of checkered coverage that Congress sought to eliminate in 1972." *Id.* at 426. The premise of the First and Fifth Circuit's decisions, like the argument rejected in *Herb's Welding*, "goes far beyond Congress' undoubted desire to treat equally all workers engaged in loading or unloading a ship, whether they were injured on the ship or on an adjoining pier or dock." *Id.* As the Court observed in *Herb's Welding*, because the situs requirement is geographic, "there will always be a boundary to coverage, and there will always be people who cross it during their employment." *Id.* (citing *Nacirema*, 396 U.S. at 223-24). "If that phenomenon was

enough to require coverage, the Act would have to reach much further than anyone argues it does or should." *Id.* at 426-27. The Fourth Circuit relied on this very passage from *Herb's Welding* in refusing to extend coverage to an entire manufacturing facility in *Brickhouse*. *See* 142 F.3d at 220.

In addition, the decision in *Caputo* was expressly premised on the liberal construction approach of *Voris v. Eikel*, 346 U.S. 328, 333 (1953), in which this Court observed that the LHWCA should be "liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results." More recently, however, this Court has declined in LHWCA cases to apply *Voris*, and has instead emphasized as the "controlling principle" the "basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written." *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992); *see also id.* at 502 (Blackmun, J., dissenting) (criticizing Court for ignoring *Voris*' liberal construction rule); *cf. Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 281 (1994) (abrogating the "true doubt" rule, which shifts burden of persuasion to party opposing LHWCA claim). *Cowart* and *Greenwich Collieries* thus undermine one of the key assumptions upon which the *Caputo* decision and the decision of the Fifth Circuit rest.

This Court should grant certiorari to clarify the scope of its dictum in *Caputo* and the effect of its subsequent decisions in *Herb's Welding*, *Cowart*, and *Greenwich Collieries*.

II. THE FIFTH CIRCUIT'S HOLDING THAT WHENEVER ANY PART OF A MANUFACTURING PLANT IS USED TO LOAD OR UNLOAD VESSELS, THE ENTIRE PLANT IS "CUSTOMARILY USED" FOR SUCH PURPOSES IS INCONSISTENT WITH CONGRESSIONAL INTENT.

"The issue of [LHWCA] coverage is an issue of statutory construction and legislative intent." *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 305 (1983). The Fifth Circuit's approach to the situs issue cannot be squared with any of the traditional indicia of legislative intent.

1. Each of the situses specifically enumerated in § 3(a) – piers, wharves, dry docks, terminals, building ways, and marine railways – is, by its very nature, maritime-related.[6] Under the well-established interpretive principle *ejusdem generis*, "[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." 2A *Sutherland, Statutes and Statutory Construction* § 47.17 at 188 (4th ed., Norman Singer ed. 1973). Thus, it follows that,

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[6] The maritime character of piers, wharves, dry docks, and terminals is common knowledge. A "marine railway" consists of "inclined tracks extending into the water so that a ship can be hauled up on a cradle or platform for cleaning or repairs." *Webster's Third New International Dictionary* 1382 (1993). A "building way" is "a permanent shipyard structure located entirely on land which [is] designed and is used exclusively for new ship construction. To facilitate the launching of completed vessels, the outermost or seaward end of the building way extends into the water on an incline." *O'Leary v. Puget Sound Bridge & Dry Dock Co.*, 349 F.2d 571, 573 (9th Cir. 1965).

in order to come within the purview of § 3(a), an "other adjoining area" must likewise be of an inherently maritime character. As the Fourth Circuit has put it, an "adjoining area" must be "like" a pier, wharf, dry dock, terminal, building way, or marine railway – *i.e.*, it must be "a discrete structure or facility the very raison d'être of which is its use in connection with navigable waters." *Brickhouse*, 142 F.3d at 222.

Here, the Fifth Circuit acknowledged that the "pinpoint site" of Nixson's accident – the rail line – was not "customarily used" for loading or unloading vessels; rather, its coverage determination rested on its conclusion that the entire "area constituting Mobil's facility" was "customarily used" and thus a § 3(a)-covered situs. App. 2a. But, unlike a pier or a wharf, a fertilizer manufacturing plant simply is not by its very nature a maritime facility. The fertilizer plant's purpose – its "raison d'être" – is to manufacture fertilizer, not to build or service ships. Accordingly, the plain language of § 3(a) cannot sustain the Fifth Circuit's sweeping interpretation.

2. Nor does the legislative history of the 1972 Amendments lend any support to the Fifth Circuit's extension of the LHWCA beyond Mobil's barge docks to include an entire manufacturing plant. To the contrary, the Senate Report indicates that Congress' purpose was merely to "expand[] the coverage of th[e] Act to cover injuries occurring *in the contiguous dock area related to longshore and ship repair work*." S. Rep. No. 92-1125, at 2 (1972) ("S. Rep.") (emphasis added). The House and Senate Reports both cite as a "typical example" the following scenario, which demonstrates the limited intended scope of the shoreward extension:

> [C]argo, whether in break bulk or containerized form, is typically unloaded

> from the ship and immediately transported to a storage or holding area *on the pier, wharf, or terminal adjoining navigable waters*. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area.

S. Rep. at 13; H.R. Rep. No. 92-1441, at 11 (1972) (emphasis added).

3. Finally, the Fifth Circuit's decision sweeping Mobil's entire manufacturing plant into LHWCA coverage merely because one part of the plant is used to load and unload vessels is contrary to this Court's own explanations of Congress' intent. As an initial matter, as this Court observed in *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 73 (1979), the 1972 situs amendments were a "respon[se]" to the 1969 *Nacirema* decision. In *Nacirema*, this Court declined to extend pre-1972 LHWCA coverage to "injuries occurring on piers" because "structures such as wharves and piers, permanently affixed to land, are extensions of the land," 396 U.S. at 213-15, but expressly invited Congress to overrule its decision via legislative amendment, *see id.* at 224. Particularly given this Court's invitation and Congress' prompt response, the 1972 Amendments should be read primarily to extend LHWCA coverage to the sorts of employees denied coverage in *Nacirema* – *i.e.*, workers loading vessels on piers and wharves immediately adjacent to the water.

Thus, this Court has explained that Congress' purpose in amending § 3(a) was to "avoid anomalies inherent in a system that drew lines at the water's edge," *Caputo*, 432 U.S. at 281, and to "extend[] coverage to the area adjacent to the ship that is normally used for loading and unloading," *Schwalb*, 493 U.S. at 46. Although it was unquestionably

"anomal[ous]" to afford LHWCA coverage to employees on one end of the gangplank while denying it to those on the other, there is nothing anomalous in limiting coverage to genuinely maritime areas and refusing to extend the notion of maritime situs to include entire manufacturing plants.

There is no doubt that some areas within Mobil's manufacturing plant constitute maritime situses – the four loading docks, for instance, are clearly areas that "adjoin[]" the water and are "customarily used" for maritime purposes. However, there is no evidence – in the text of § 3(a), in the legislative history, or in this Court's precedents – that Congress intended for entire manufacturing facilities like Mobil's to be deemed "customarily used" for loading or unloading vessels simply because they have their own docks. Had Congress so intended, it would have used language to reflect that intent; indeed, it need only have added a few words so that the catch-all clause read: "... or other adjoining *facility that includes* areas customarily used" for loading or unloading vessels. As this Court has noted more than once, such a decision is for the members of Congress – courts "should not legislate for them." *Herb's Welding*, 470 U.S. at 427; *see also Nacirema*, 396 U.S. at 224 ("The invitation to move [the coverage] line landward must be addressed to Congress, not to this Court.").

III. THE PROPER INTERPRETATION OF THE PHRASE "CUSTOMARILY USED" PRESENTS AN IMPORTANT FEDERAL QUESTION THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

This Court has in the past addressed several issues relating to the scope of coverage under the LHWCA. This Court has recognized, for instance, that the LHWCA "contains distinct situs and status requirements," *P.C. Pfeiffer Co.*, 444 U.S. at 78; that "the status requirement is

occupational and the situs test is geographic," *Perini*, 459 U.S. at 324 n.32; and that neither requirement should be read to render the other superfluous, *see Herb's Welding*, 470 U.S. at 426. Moreover, this Court has on numerous occasions considered the contours of the LHWCA's "status" requirement. *See, e.g.*, *Schwalb*, 493 U.S. 40; *Herb's Welding*, 470 U.S. 414; *Perini*, 459 U.S. 297; *P.C. Pfeiffer Co.*, 444 U.S. 69; *Caputo*, 432 U.S. 249. But this Court has never spoken definitively to the meaning of § 3(a)'s situs requirement – or, more specifically, to the meaning of the catch-all clause's requirement that an "adjoining area" be "customarily used" for loading or unloading.

In the vacuum left by this Court's decisions, a circuit conflict has developed over the proper interpretation of the phrase "customarily used": Is it the case that whenever a manufacturing plant has its own docks that are used to load or unload vessels carrying materials to or from the plant, the entire plant – including concededly non-maritime areas – is "customarily used" within the meaning of § 3(a)? The First and Fifth Circuits say yes; the Fourth Circuit says no. So long as the split is allowed to persist, Congress' objective of providing a uniform compensation structure will be thwarted. Indeed, under the current state of the law, employers like Mobil that have multistate operations remain subject to dramatically different coverage regimes in different part of the country.

* * *

It would appear that this Court was poised to clarify the meaning of the "customarily used" standard when it granted certiorari two years ago in *Brooker v. Durocher Dock and Dredge*, 133 F.3d 1390 (11th Cir.), *cert. granted*, 524 U.S. 982 (1998). However, the petition in *Brooker* was dismissed pursuant to Rule 46.1 by agreement of the parties. *See* 525 U.S. 957 (1998). This petition provides the Court

the opportunity it lost in *Brooker* – an opportunity to clarify the much-debated meaning of the LHWCA's situs requirement.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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July 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-60273

MOBIL MINING & MINERALS; INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,

Petitioners

versus

DAVID R. NIXSON; DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR,

Respondents.

Petition for review of an Order of the
Office of Workers Compensation Programs &
The U.S. Department of Labor

Before GARWOOD, WIENER, and DENNIS, Circuit Judges.

PER CURIAM:*

Respondent-Claimant David R. Nixson sought benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901, *et. seq.* for an arm

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* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

injury sustained while working for his employer, Mobil Mining & Minerals, at rail facilities on Mobil's premises adjacent to the Ship Channel in Houston, Texas. The claim proceeded on stipulated facts before an Administrative Law Judge, the ALJ awarded Nixson benefits under the LHWCA after concluding that he met both the "status" and "situs" tests for coverage. Petitioners appealed the ALJ's ruling to the BRB which affirmed. Petitioners now ask us to reverse the BRB and ALJ, conceding "status," but challenging "situs."

We have carefully reviewed the stipulated facts regarding both the particular site where the accident occurred and the surrounding area constituting Mobil's facility contiguous to the Ship Channel in light of the applicable law as set forth in the briefs of counsel to this court and discussed in oral argument before us. Particularly in light of our standard of review of this case and the seminal case in this court, *Texports Stevedore Co. v. Winchester*, 632 F.2d 504 (5th Cir. 1980) (*en banc*), we are convinced that the "area," as distinguished from the pinpoint site of the accident, is a covered situs pursuant to the plain wording of § 903(a) of the LHWCA. As Nixson's status was stipulated, his claim is clearly within the coverage of the LHWCA. We therefore affirm the rulings of the ALJ and the BRB to that effect.

AFFIRMED.

BRB No. 98-988

DAVID R. NIXSON

Claimant-Respondent)

v.

MOBIL MINING AND MINERALS

and

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA

Employer/Carrier
Petitioners

Date Issued: March 3, 1999

DECISION AND ORDER

Appeal of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Dennis L. Brown, Houston, Texas, for claimant.

Thomas C. Fitzhugh III and J. Corbin Van Arsdale (Fitzhugh & Elliott, P.C.), Houston, Texas, for employer/carrier.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and

NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (97-LHC-238) of Administrative Law Judge Lee J. Romero, Jr., rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. § 921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer is a fertilizer manufacturer whose facilities adjoin the Houston Ship Channel. It receives raw materials (sulphur, anhydrous ammonia, phosphate rock, and sulfuric acid) by truck, railway and barges, and it produces sulfuric acid, phosphoric acid, ammonium thiosulfate (liquid fertilizer), and two grades of solid fertilizer called dioammonium phosphate and monoammonium phosphate. The finished product is shipped out by trucks, railway, barges and ships.

Claimant and employer stipulated that claimant was injured on January 16, 1994, during the course of his employment,[1] and that employer paid claimant benefits under the Texas workers' compensation statute for his injuries, but that if the administrative law judge found claimant to be a covered employee under the Longshore Act, he would be entitled to greater benefits for the same periods of time.

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[1] Claimant's left arm was crushed between two railcars during the switching procedure. He filed a claim for compensation for the left arm injury as well as for a psychological injury. Emp. Ex. 2.

Further, they stipulated that, during the year preceding his injury, between 41 and 50 percent of claimant's work involved loading and unloading vessels. At the time of his injury, claimant was classified as an "A" operator. An "A" operator undertakes various duties including operating the marine loader to load finished product on to barges, operating the Buhler to unload phosphate rock from barges, operating the loading units in Buildings 9 and 10, and driving the diesel locomotive. *See* Tr. at 31; *see also Gavranovic v. Mobil Mining & Minerals*, ___ BRBS ___, BRB No. 98-741 (February 19, 1999).[2] On the day of his injury, claimant was assigned to the locomotive crew to keep the railcars moving ad the units supplied with railcars to load. Tr. at 103.

The administrative law judge found that employer's facility adjoins the Houston Ship Channel and is suited for its purpose of receiving raw materials and shipping finished product along the waterway. Based on this proximity to a navigable waterway and the occurrence of the maritime activities of loading and unloading barges and ships, the administrative law judge found that employer's facility has a maritime nexus. Decision and Order at 14. Further, in accordance with *Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 12 BRBS 719 (5th Cir. 1980) (*en banc*), *cert. denied*, 452 U.S. 905 (1981), the administrative law judge found that employer's entire facility, including the rail line on which claimant was injured, is an "adjoining area" customarily used for maritime activity and, therefore, is a covered situs under Section 3(a) of the Act. 33 U.S.C. § 903(a); Decision and Order at 15. With regard to

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[2] *Gavranovic* is a consolidated appeal involving two employees who worked at employer's facility. One employee was classified as an "A" operator, and one was a "C" operator. *Gavranovic*, slip op. at 2-3.

claimant's status, the administrative law judge noted the parties' stipulation regarding the percentage of claimant's duties which were maritime during the year preceding his injury, as well as claimant's testimony that he had a daily expectation of being assigned to maritime work 50 percent of the time, and he found that claimant is subject to regular maritime work assignments. Decision and Order at 16-17. Consequently, he concluded that claimant fulfilled the status requirement of Section 2(3) of the Act, 333 U.S.C. § 902(3). Decision and Order at 17.[3] Employer appeals the administrative law judge's decision regarding coverage, and claimant responds, urging affirmance.

Employer contends the administrative law judge erred in concluding that its entire facility, including the rail line where claimant was injured, is a covered situs under the Act. Employer also challenges the administrative law judge's determination that claimant is a covered employee, as he is a land-based worker who was injured while performing land-based work on the railway. The issues raised herein by employer are the same issues raised by employer in *Gavranovic*. *See Gavranovic*, slip op. at 5. In *Gavranovic*, the Board rejected employer's various arguments and held that, under the controlling law of the United States Court of Appeals for the Fifth Circuit, *Winchester*, 632 F.2d at 504, 12 BRBS at 719, employer's entire facility constitutes a covered situs under the Act. specifically, in light of its location adjacent to the Houston Ship Channel, a navigable waterway, and in light of the occurrence of significant maritime activity on the docks at employer's facility, loading and unloading

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[3] The administrative law judge also determined that employer is liable for a Section 14(e), 33 U.S.C. § 914(e), penalty and interest. Decision and Order at 17-18. These findings have not been challenged on appeal.

barges and ships, the Board affirmed the administrative law judge's conclusion that the entire facility is an "adjoining area" which is "customarily used" for maritime purposes. *Gavranovic*, slip op. at 7-8; *see Sisson v. Davis & Sons, Inc.*, 131 F.3d 555, 31 BRBS 199 (CRT) (5th Cir. 1998); *Winchester*, 632 F.2d at 504, 12 BRBS at 719; *Stroup v. Bayou Steel Corp.*, 32 BRBS 151 (1998); *Melerine v. Harbor Const. Co.*, 26 BRBS 97 (1992). Further, the Board affirmed the administrative law judge's determination that claimants met the status requirement, rejecting employer's argument that the "moment of injury" test prevents coverage. The Board held that the Fifth Circuit's "moment of injury" test is used to broaden, not narrow, coverage under the Act. *Gavranovic*, slip op. at 8; *Universal Fabricators, Inc. v. Smith*, 878 F.2d 843, 22 BRBS 104 (CRT) (5th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990); *Thibodaux v. Atlantic Richfield Co.*, 580 F.2d 841, 8 BRBS 787 (5th Cir. 1978), *cert., denied*, 442 U.S. 909 (1979); *McGoey v. Chiquita Brands Int'l*, 30 BRBS 237 (1997); *Scott v. Tug Mate, Inc.*, 22 BRBS 164 (1989). Finally, in light of the occupational nature of claimants' work as "A" and "C" operators, and their regular involvement in loading and unloading barges, the Board held that the administrative law judge correctly determined they were covered under Section 2(3) of the Act. *Gavranovic*, slip op. at 8-9; *see* 33 U.S.C. § 902(3); *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 46, 23 BRBS 96 (CRT) (1989); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 273, 6 BRBS 150, 165 (1977); *Boudloche v. Howard Trucking Co.*, 632 F.2d 1346, 12 BRBS 732 (5th Cir. 1980), *cert. denied*, 452 U.S. 915 (1981).

Because the present case involves the same facility and the same employee classification and duties as the Board addressed in *Gavranovic*, we reject employer's contentions on appeal for the reasons set forth in *Gavranovic*. We affirm the administrative law judge's findings that employer's entire

facility is a covered situs and that claimant is a covered employee pursuant to Sections 2(3) and 3(a) of the Act. Consequently, we affirm the award of benefits to claimant. *Gavranovic*, slip op. at 8-9; *see also Schwalb*, 493 U.S. at 40, 23 BRBS at 96 (CRT); *Caputo*, 432 U.S. at 249, 6 BRBS at 150; *Winchester*, 632 F.2d at 504, 12 BRBS at 719.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

/s/ Roy P. Smith
Administrative Appeals Judge

/s/ Regina C. McGranery
Administrative Appeals Judge

/s/ Malcolm D. Nelson
Acting Administrative Appeals Judge

In the Matter of:

DAVID R. NIXSON

Claimant

v.

MOBIL MINING & MINERALS

Employer

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA

Carrier

Case No. 97-LHC-238
OWCP No. 08-111299

APPEARANCES:

DENNIS L. BROWN, ESQ.

For The Claimant

THOMAS C. FITZHUGH, III, ESQ.
CORBIN VAN ARSDALE, ESQ.

KERRY McKNIGHT, ESQ.

For The Employer/Carrier

BEFORE: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (herein the Act), 33 U.S.C. § 901, *et seq.*, brought by David R. Nixson (Claimant) against Mobil Mining & Minerals (Employer) and Insurance Company of the State of Pennsylvania (Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of hearing issued scheduling a formal hearing on September 22, 1997, in Houston, Texas. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered 18 exhibits, Employer/Carrier proffered three exhibits which were admitted into evidence along with one Joint Exhibit. This decision is based upon a full consideration of the entire record.[1]

Post-hearing briefs were received from the Claimant and the Employer/Carrier on December 22, 1997. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. That the date of Claimant's accident and injury was January 16, 1994.

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[1] References to the transcript and exhibits are as follows: Transcript: Tr.; Claimant's Exhibits: CX-___; and Employer/Carrier Exhibits: EX-___; and Joint Exhibit: JX-___.

2. That Claimant's injury occurred during the course and scope of his employment with Employer.

3. That there existed an employee-employer relationship at the time of the accident/injury.

4. That the Employer was notified of the accident/injury on January 16, 1994.

5. That Claimant filed a Longshore claim on May 20, 1996.

6. That Employer filed a Notice of Conversion on July 22, 1996.

7. That an Informal conference was held before the District Director on August 21, 1996.

8. That Claimant's average weekly wage, based on his gross income in the 52-week period prior to the injury which totaled $64,846.01, is $1,247.06 with a compensation rate of $738.30.

9. That Claimant received temporary total disability benefits from January 17, 1994 through October 7, 1994 at a compensation rate of $464.00 for 41 1/7 weeks or a total of $19,090.28 under the Texas State Compensation Act.[2]

10. That medical benefits for Claimant have been paid pursuant to Section 7 of the Act.

11. That Claimant is being or has been paid permanent partial disability benefits at 100% for his arm

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[2] The parties further stipulated that the foregoing dates are the appropriate dates for temporary total disability benefits, and if longshore jurisdiction is found, Employer/Carrier will pay benefits for this time period at the higher Longshore average weekly wage with a credit for the amounts paid under the state compensation act for temporary disability.

under the Texas State Compensation Act for a 58% whole body impairment totaling payments of $56,550.00 (174 weeks at $325.00/week).[3]

12. That Claimant reached maximum medical improvement on October 7, 1994.

13. That in the year before Claimant's injury, between 40-51% of his work assignments involved the loading and unloading of vessels.

II. ISSUES

The unresolved issues presented by the parties are:

1. Jurisdiction; situs and status coverage.

2. Attorney's fees, penalties and interest.

III. SUMMARY OF THE EVIDENCE

The Testimonial Evidence

Claimant

Claimant was born on August 14, 1956, is married and has three children. (Tr. 28). He began employment with the Employer on June 12, 1989 as a laborer and progressed through various job classifications to the position of Operator A which he held at the time of his injury. Claimant is presently classified as a Laboratory Tester A. (Tr. 29).

Employer is a manufacturer of industrial fertilizer. (Employer's Brief, page 1). Claimant testified that the Employer operates four shifts on a rotating basis. Each shift is comprised of three A Operators, one B Operator and one

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[3] If longshore jurisdiction is found, the Carrier agrees to pay the difference between 100% to the arm under the schedule in § 8(c)(1)[31 weeks at the average weekly wage] and the amount paid under the state act for permanent disability.

C Operator. (Tr. 30-31). An A Operator performs functions to include operating a marine loader, the Buhler, unit 9, unit 10; overhead crane work; unloading ammonia barges, sulfuric acid barges at the acid rack; and loading Thio barges. (Tr. 31). The job of a B Operator is mainly the operating of the front-end loader. (Tr. 59). The C Operator is referred to as a rail helper since his primary function is to assist in loading rail cars. The A Operator's jobs are marine type jobs of loading and unloading barges and vessels and the operation of various equipment associated with that process. (Tr. 60).

Claimant testified that the dock supervisor at the time of his injury was Mr. Ernest Gardner who supervised all of the shipping dock operations. (Tr. 82). A shipping dock employee such as Claimant would report to the dock office or coffee shack where he would receive his daily assignment posted on the assignment board in the dock office. Each assignment would indicate which job the employee was to perform on that particular shift. (Tr. 59). Claimant testified that it was Mr. Gardner's responsibility to assign specific jobs to the various operators on each shift. (Tr. 59). Claimant stated that on a daily basis he had a 50% expectation of working on the waterfront if a vessel was coming in or if a barge was present. (Tr. 82, 102). He would have a "pretty good idea we're going to be either loading it or off-loading it." (Tr. 82). He further stated that there are times when there is nothing but waterfront work going on; either loading fertilizer or unloading one of the barges, whether it be rock or an ammonia barge. (Tr. 83).

Claimant testified that if waterfront loading or unloading jobs were being performed simultaneously with railcar work, he would more likely be assigned to the waterfront job. (Tr. 84). All of Claimant's work is performed at the A Operator pay rate. (Tr. 87). Although Claimant would be assigned a specific job function on a daily

basis, he testified that there have been occasions when he was called off of his assigned job, during the normal course of an eight hour shift, to perform work directly on the waterfront by relieving other employees for lunch breaks, "a necessity," or in the event of an emergency such as the arrival of an unexpected barge. (Tr. 90).

Claimant identified the Employer's facility from an aerial photograph and a blueprint or emergency exist map of the plant. (Tr. 32; CX-7, CX-11). The waterfront area of the facility is located on the Houston Ship Channel and is comprised of a phosphate rock unloading dock where phosphate ore is unloaded from barges by the use of a Buhler (Tr. 33); the East Dock where sulfuric acid and the Thio barges are loaded and unloaded; and the West Dock where the finished product of fertilizer is loaded into barges or vessels. (Tr. 33). The waterfront facility also contains an ammonia unloading dock where ammonia barges are unloaded. (*See also* Employer's Responses to Interrogatories, CX-1, p. 3).

Claimant described other facilities along the waterfront which are Building 10 or the West Storage Area where dry fertilizer is stored and Building 9 where additional dry fertilizer is stored. (Tr. 34). Buildings 9 and 10 are fronted by railroad tracks which provide empty cars from storage tracks for loading. Trucks are also loaded from Building 10. In the area of Building 9, the Employer maintains overhead cranes which are used for loading vessels. A conveyor belt sustem [*sic*] connects Building 9 to the loading dock area. Across from Building 9 are located rock grinding mills where phosphate ore is stored along with the rock storage dome. (Tr. 34). The acid rack, located near Tank 106 of Employer's facility, is the area where sulfuric acid is loaded into rail cars and unloaded from rail cars. (Tr. 34).

Claimant testified that the Employer's continual operation is dependent upon raw materials such as phosphate rock as a source of its manufacturing process. (Tr. 36). He estimated that approximately 900,000 tons of phosphate rock were unloaded at the Employer'' facility during the year prior to his injury. (Tr. 36). Claimant stated that only A Operators are involved in the loading and unloading process of Employer's operations. (Tr. 37). Claimant testified that the raw product of sulfuric acid arrives at the facility by barge and rail car and is further transported via pipeline from the Employer's facility to the Air Products facility, another manufacturer that uses the sulfuric acid as a drying agent in their process. After use, Air Products returns the sulfuric acid to the Employer for use in its process. (Tr. 39-40).

Claimant testified that the finished product of fertilizer is shipped out via barge and ship and can be transported by railcar. (Tr. 41). Claimant estimated that approximately 580,000 tons of fertilizer is shipped from the Employer's facility to its customers. Liquid fertilizer, also known as Thio, is stored and shipped from storage tanks at the Employer's facility by barge to customers. (Tr. 42). The plant has a capacity to load approximately 5,000 tons of dry fertilizer into vessels on a daily basis by the use of a marine loader. (Tr. 43). However, a capacity of only 3,000 tons may be loaded per day when using rail cars. (Tr. 44).

Claimant testified that the phosphate ore is off-loaded from a vessel and transported by a system of conveyor belts into the rock dome and silos where it is stored until used. (Tr. 45, 47; *See* CX-1, p. 4). During the one-year period before Claimant's injury, 50 phosphate rock barges docked and were unloaded at Employer's facility. (CX-1, p. 4). Claimant further testified that as a Buhler operator unloading phosphate rock, the operator would take a position on the barge with the satellite control box to view the rock operation

and the feet of the Buhler which "sucks" up the rock and dumps it onto a conveyor belt which then travels to the silos. (Tr. 54, 62).

A Operators also operate the jib crane which is used to lift and place front-end loaders onto barges to do final states of off-loading. The shift members are required to sweep up and shovel the debris into the box of the front-end loader in the last stages of off-loading phosphate rock. (Tr. 57). Claimant further testified that in addition to working on the unloading docks, part of an operator's duties include cleaning such docks regularly as routine maintenance. (Tr. 49).

At the ammonia unloading dock, which is a regular work site for Claimant's shift crew, as an A Operator Claimant operates winches to tie up barges that are moored at the unloading dock. He will also assist the tankerman in "wrestling" the hose onto the barge for hookup to manifolds and the eventual unloading of the ammonia. (Tr. 50). On occasion, Claimant was required to actually perform duties on the ammonia barges being unloaded. (Tr. 50-51). Additionally, Claimant and other shift crew members would lubricate and grease joints of the equipment used in unloading barges. (Tr. 51). As part of the regular maintenance of the facility, Claimant and other shift members were required to sweep and hose off the ammonia dock areas to make sure that such areas were fit to walk on. (Tr. 52; *See* CX-1, pp. 5-6). During the one-year period before Claimant's injury, 37 ammonia barges docked and were unloaded at Employer's facility. (CX-1, p. 6).

Claimant testified that although the Employer has a contractual agreement with a company who provides employees to tie up barges upon arrival, occasionally barges arrive at unexpected times or nor one is present to tie up barges and his shift would be required to assist in securing barges. (Tr. 56). Claimant testified that he has been called

off of other jobs to tie off barges upon their arrival at Employer's facility because of the narrowness of the ship channel which is approximately 500 to 600 feet wide. (Tr. 57-58).

Claimant testified that dry fertilizer is loaded via conveyor belt from Building 9 into river barges which have a capacity of approximately 1,500 to 1,600 tons. It takes approximately eight hours to load a barge of that size. (Tr. 65). A phosphate ore barge which transports the raw phosphate has a capacity of approximately 18,000 to 19,000 tons and is fully discharged in 48 to 60 hours. (Tr. 69).

Claimant testified that there are two crane operators located inside Building 9 and one unit operator outside of Building 9 who operate the overhead cranes that pick up fertilizer in five-ton buckets suspended by cables and position the fertilizer into 100-ton hoppers inside the building. The fertilizer travels through a screen and conveyor system and dumps onto a belt that travels to the marine loader and is dumped into another belt system and ultimately loaded into a barge or vessel. Claimant described this process as a continuous one. (Tr. 68).

Sulfuric acid is unloaded from barges by way of a hose as is liquid fertilizer (Thio) loaded into barges. The shift members will assist the tankerman with the hoses to allow him to attach the hose to manifolds. The operators control the valves on the docks and coordinate with the operators in the plant for the loading and unloading process. (Tr. 75); *See* CX-1, p. 7). During the one-year period before Claimant's injury, 18 sulfuric acod [*sic*] docked and are unloaded at employer's facility. (CX-1, p. 7).

Operators will also load trucks and railcars out of Building 10. Occasionally products from Building 10 can be loaded directly onto a ship or barge. (Tr. 76).

Shift members are also required, as part of their duties, to clear debris from the waterfront area. (Tr. 80). This cleanup work is performed approximately six times per year but is not documented as part of the work assignments of the shift members. (Tr. 81).

Claimant estimated that it takes approximately eight to sixteen hours to load a Thio barge and approximately eight to twelve hours to load a DAP or MAP barge. (*See* CX-1, pp. 8-9). He estimated that it would take approximately four days to load a 20,000 ton vessel with fertilizer. (Tr. 101). Claimant testified that on at least one occasion he recalled loading railcars that went directly to another shipping facility to load a ship or barge from the railcars. (Tr. 102).

The foregoing locations, equipment and activities are depicted in 44 photographs and a video described by Claimant at the hearing. (Tr. 48-81; CX-8 and 9).

Claimant identified Exhibit 4 as a compilation of his hours of work. The document comprises earnings from January 3, 1993 through January 16, 1994. A total of 2,192 straight-time hours are reflected for that period time, 797.5 overtime hours and 40 hours for vacation. Of the total number of hours worked, 408.5 hours are performed on "rails, rail help, switching or locomotive" work, as reflected in the "History/Comments" section of the weekly time sheets. Of the 408.5 hours of rail or locomotive time, 70.5 hours were overtime hours. Thus, 13.6 percent of his work time was devoted to rail or locomotive work and conversely, 86.4 percent of his work was involved in loading and unloading and associated duties along the waterfront.[4] (CX-

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[4] Although Claimant described responsibility centers 6155 as "dock loading" and 6110 as "unloading," CX-21 reflects 6155 as "shipping." It is further noted that the job safety analysis data sheets (CX-15) disclose that code 6115 in [*sic*] used (...continued)

4; Tr. p. 91). Employer responded to Interrogatory No. 18 that Claimant worked 82 days during the 52-week period before his injury in which he participated in some step of the loading or unloading process for raw materials or finished product, either going to or coming from a ship or barge or other means of water transportation. (CX-1, pp. 10, 14-15).

Claimant testified that on the day of his accident and injury he was assigned to work on the locomotive crew moving rail cars and keeping "units" (presumably 9 and/or 10) supplied with rail cars to load. (Tr. 103). His duties also included moving loaded rail cars out onto other tracks. Claimant testified that rail cars are delivered to the Employer by the Port Terminal Railroad Association and that the rail cars are stored on tracks until needed for use. (Tr. 104). Claimant stated that rail cars arrive at the Employer's facility loaded with materials such as sulfuric acid and commodities to be unloaded. (Tr. 105-106). Part of the a shift's duties

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interchangeably with not only dock loading but also truck and rail car activities, such as "operating car puller, fueling plant vehicles, connect air to outbound cars, disconnect locomotive from outbound cars, connect air to top of tank cars, clean track scale pits, repair track/truck scale, spot sulfur car, spot acid tank car, spot hopper cars at Building 10 for loading, clean truck scale pit, close and seal doors on rail cars, car cleaning, parking railroad cars at road crossing, lower walkway to tank car, disconnect unloading arm from acid tank car, disconnect air from top of tank car, hooking unloading arm to acid tank car, acid rail car unloading, loading Thio trucks, applying steam-sulfur railcar unloading, unloading sulfur rail cars, hopper car loading, setting hand brakes on rail cars, and open top doors on hopper cars. Of the 2989.5 hours listed in Claimant's weekly time sheets, 893 denote code 6110 for "unloading" which is 29.8% of his total work time. The "History/Comments" section of the time sheets do not clearly delineate hours worked in loading various modes of transport such as barges, vessels, trucks and rail cars.

could include cleaning out the rail cars after being unloaded. (Tr. 106).

Claimant further testified that approximately 80% of the finished product leaving the plant is shipped out by rail car. (Tr. 106).[5] Claimant identified the rail car and track area where he was injured as located behind buildings 9 and 10 and near the rock storage tanks to the east. (Tr. 109-111). The distance from the site of injury to the waterfront area is not reflected in the record. Claimant testified that he was attempting to couple cars together for purposes of pushing them back to the storage tracks when his accident occurred. (Tr. 110; EX-2).

Ernest Odell Gardner

The parties deposed Ernest Gardner on June 4, 1997. (EX-3). Mr. Gardner testified that he retired from Employer on August 1, 1996 after 36 years of employment. (CX-3, p. 8). At the time of his retirement, Mr. Gardner was an area supervisor over shipping and receiving. His responsibilities included receiving raw materials by barge, hopper cars and tank cars and loading finished products into ships, barges, hopper cars, tank cars and trucks. (CX-3, p. 9). His primary job duties were to make job assignments, coordinate all loading and unloading, figure schedules, coordinate maintenance and repairs and preventive maintenance.

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[5] Receipts and shipments for 1993 are reflected in CX-23. A comparison of receipts to shipments is shown in CX-24. The admission of both exhibits was reserved pending a post-hearing review for accuracy and authentication by Employer/Carrier. No objection has been lodged, accordingly, CX-23 and CX-24 are hereby received into the record. Of the total tonnage of exported fertilizer (588,479 tons) in 1993, 492,669 tons or 83.7% were transported by trucks and rail. Only 13 vessels and 8 barges were loaded with finished product in 1993, whereas 2491 trucks and 4,034 rail cars were utilized for transport.

Mr. Gardner received his work assignments from the traffic manager. (CX-3, p. 10). He testified that he had 20 operators working in the Shipping and Receiving Department, five operators per shift with four shifts. On each shift there were three A Operators, one B Operator and one C Operator. (CX-3, pp. 12-13). A Operators operate a unit to load fertilizer into trucks and hopper cars, operate a diesel locomotive, and an overhead crane, unload ammonia barges, operate a marine loader, operate the Buhler to discharge a rock barge, unload sulfuric acid barges and load thiosulfate barges, load thio tank cars and unload sulfuric acid tank cars. (CX-3, p. 14). The B Operators operated a front-end loader to load out fertilizer into tank cars and operated front-end loaders inside the hull of a rock barge to unload a rock barge or to push rock with a front-end loader to a conveyor belt. (CX-3, pp. 14-15). A C Operator assists the unit operator in loading hopper cars, cleaning cars, moving hopper cars and tank cars around inside the plant or outside the plant. (CX-3, p. 15). A Operators were also required to do B and C Operator duties at times. (CX-3, p. 18).

Mr. Gardner testified that his only assignment responsibility was for job duties for the 2:00 p.m. to 10:00 p.m. shift. (CX-3, p. 20). Job assignments were reflected on the assignment board located in the break room or lunch room. (CX-3, p. 21). He testified that job assignments could change during a shift if job requirements necessitated such a change. Changes in assignments due to requirements were very rare, but would occasionally occur. (CX-3, p. 22).

In describing a typical time sheet, Mr. Gardner testified that the responsibility center code number 6155 indicated that an operator was working out of one of the units such as Building 9 or 10 and normally means they we loading products out instead of unloading something. The responsibility center code number 6110 indicated that the operator was performing work on the actual dock area,

unloading some kind of products off of the dock or also performing clean-up duties on the dock. (CX-3, p. 35).

Mr. Gardner described the duties of an operator unloading an ammonia barge as tying off the barge to the dock and hooking up the hoses which are then secured by the barge tankerman on the manifolds of the barge. The operator then opens and closes the valves during the unloading process. He estimated that it took and estimate of 20 hours to unload an ammonia barge which would require three shifts to complete. (CX-3, pp. 43-45).

Loading Thio, which is a finished liquid fertilizer product, into barges requires the operators to tie off an empty barge upon arrival. The A Operator then hooks a six-inch hose to the barge and opens valves to allow the pumps to begin pumping liquid fertilizer into the barge. Once the barge is completely loaded, the operator assists in undoing the ropes to allow the barge to go free. Mr. Gardner estimated that it would take an average of 16 hours to load a Thio barge. (CX-3, pp. 46-48).

Mr. Gardner testified that from 1993 fertilizer was only loaded out of Building 9 into barges and ships. (CX-3, p. 50). Mr. Gardner testified that dry fertilizer is loaded by overhead cranes in Building 9 into 100-ton hoppers that then drop the fertilizer onto a conveyer belt system that leads out to the dock area. The conveyor belts lead out to the marine loader which is over the dock area. The marine load then dumps the dry fertilizer into a telescope chute that goes down into the ship or barge. The ship or barge is then moved periodically to make available empty cells for loading. (CX-3, pp. 51-54). Mr. Gardner testified that it takes an average of eight to ten hours to load a normal barge and that the company attempts to load an average of 5,000 metric tons per day. (CX-3, pp. 54-55). Mr. Gardner further testified that a 1,000 ton vessel would normally take 16 hours to load

whereas a 25,000 ton vessel would take up to six days. (CX-3, p. 55).

Mr. Gardner testified that acid barges are unloaded in the same area where Thio barges are loaded. Approximately 15 to 20 acid barges are unloaded each year. He estimated that it took an average of ten hours to unload an acid barge at 180 tons an hour. (CX-3, p. 56). Unloading an acid barge is primarily an A Operator's job. (CX-3, p. 57).

Mr. Gardner testified that phosphate rock barges arrive at the facility and are secured by contract stevedores who also discharge the barge upon completion of unloading. An A Operator will operate the Buhler which is extended into the barge and sucks up the rock out of the barge and places it onto a conveyor belt system. (CX-3, pp. 60-61). The phosphate rocks are transported by conveyor belt system into the rock dome or three or four silos located next to the dome. (CX-3, p. 62). Mr. Gardner testified that approximately 80 percent of the finished product is transported by trucks and rail. (CX-3, p. 78).

The Contentions of the Parties

Claimant contends that his duties as an A operator involved traditional maritime employment functions such as tying up and releasing barges, hooking up the hoses for discharge or receiving a product, transferring the discharge of product or the delivery of product and cleaning the dock area.

Claimant further contends that Employer is a marine employer since an integral part of its operation is shipping a finished product and receiving materials via water transportation, which Employer does not contest. (Tr. 98).

Lastly, Claimant contends that he is a covered employee since his duties and not the place of injury is controlling. He argues that since his duties are essentially maritime in nature, the locus of his injury is not

determinative of status. Moreover, it is urged that Claimant achieved status under the Act since he spent at least "some of his time" [40-51%] in traditional maritime work.

Employer, on the other hand, contends that Employer's facility is not a maritime situs but a manufacturing plant and that a restrictive interpretation of the Act should be applied in the instant case. It is argued that the rail line where Claimant was injured is not an "adjoining area" and not a maritime situs since it is not an area which is customarily used by the Employer to load and unload vessels. Thus, according to Employer, Claimant is a land-based worker who was injured while performing non-maritime work on a non-maritime situs.

Employer also contends that even if Claimant was injured on a maritime situs, he must prove that "at the approximate time he incurred disability or death," he was engaged in maritime employment. Since Claimant was engaged in rail switching when injured, which is unrelated to loading or unloading a vessel, he is not a covered employee.

Employer concedes that Claimant would be covered under the Act if he was loading barges when injured. (Employer's Brief, pp 5-6; Tr. 98).

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the claimant. *Voris v. Eikel*, 346 U.S. 328, 333 (1953); *J. B. Vozzolo, Inc. v. Britton*, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof. *Director, OWCP v. Greenwich*

Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), *aff'g.* 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. *Duhagon v. Metropolitan Stevedore Company*, 31 BRBS 98, 101 (1997); *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 91 (5th Cir. 1988); *Atlantic Marine, Inc. v. Hartford Accident & Indemnity Co. v. Bruce*, 551 F.2d 898, 900 (5th Cir. 1981); *Bank v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467, *reh'g denied*, 391 U.S. 929 (1968).

Jurisdiction

To establish jurisdiction and coverage, Claimant must satisfy the two-pronged test of the "situs" and "status" requirements of the Act. 33 U.S.C. §§ 902(3), 903(a). *See Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 97 S.Ct. 2348 (1977); *Kennedy v. American Bridge Co.*, 30 BRBS 1 (1996); *See also Jones v. Aluminum Company of America*, 31 BRBS 130, 131 (1997). Status refers to the nature of the work performed whereas situs refers to the place of performance.

A. Situs

Section 3(a) of the Act provides that a compensable injury must occur on the navigable waters of the United States "including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel." 33 U.S.C. § 903(a) (1988). By the 1972 amendments to the Act, Congress expanded the jurisdictional lines landward to cover injuries occurring on the enumerated adjoining land areas.

Texports Stevedore Company v. Winchester, 632 F.2d 504, 510, 510 (5th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981).

Employer/Carrier postulate that "manufacturing areas having their own docking facilities," such as Employer's, are excluded from the landward reach of Section 3(a) and therefore its premises is not a maritime situs. It is argued that appellate courts and the Benefits Review Board have recently applied a restrictive situs requirement, following the Supreme Court's directives to apply the "plain language" of the Act. *See Sidwell v. Express Container Services, Inc.*, 71 F.3d 1134 (4th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 2570 (1996); *Parker v. Director, (OWCP*, 75 F.3d 929 (4th Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S.Ct. 58 (1996); *Ingalls Shipbuilding, Inc. v. Director, OWCP [Yates]*, ___ U.S. ___, 117 S.Ct. 796, 801-804 (1997); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 112 S.Ct. 2589, 2594-2596, 2598 (1992).

Employer contends that Claimant is a land-based worker who was injured while coupling rail cars on a rail line not used to load or unload vessels. There is no direct movement of materials or product by rail to vessels or vessels to rail. It is asserted that the rail line is not a transshipment or intermodal exchange point for cargo moving directly into maritime commerce and is neither an adjoining area nor customarily used by the Employer to load or unload a vessel. In view of such assertions, it is urged that Claimant has failed to met the situs requirement of the Act.

Since Claimant's injury did not occur on navigable waters, but rather on a rail line behind the Employer's storage area, it is necessary to evaluate the situs requirement in light of the "adjoining" language of Section 3(a) of the Act.

Contrary to the Fourth Circuit's restrictive construction of the situs requirement advocated by

Employer/Carrier, the Fifth Circuit, within whose appellate jurisdiction this case arises, has reasoned that as long as the site of an employee's injury is close to or in the vicinity of navigable waters, or in a neighboring area, the injury comes within the "broader meanings" of "adjoin" in keeping with the spirit of the Act and Congressional purposes. *Winchester*, at 514. Moreover, the Court has announced that the best way to effectuate the congressional purposes is to determine situs by looking at all the circumstances. *Id.* at 513.

Factors which have been considered in determining whether a site is an "adjoining area" have included: the particular suitability of the site for maritime uses referred to in the statute; whether adjoining properties are devoted primarily to uses in maritime commerce; the proximity of the site to the waterway; and whether the site is as close to the waterway as is feasible given all the circumstances. *Arjona v. Interport Maintenance Company, Inc.*, 31 BRBS 86, 87 (1997).

In the present matter, it is elementary that Employer's site on the Houston Ship Channel is suitable for its maritime receipt of raw materials necessary for use in its manufacturing process and shipment of its final product in commerce to its customers. The docks located along the waterway service Employer's maritime receipt of manufacturing materials and are certainly adjoining navigable waterways. Such docks are also connected to storage and manufacturing areas by conveyor belt systems to facilitate receipt and shipment. Employer's facility is situated on the Houston Ship Channel and arguably could not have been located any closer to the waterway. The proximity of its location is a definite benefit to Employer given its maritime receipt and shipment activity. I find and conclude that Employer's facility is in the vicinity of navigable waters

and is used to load and unload vessels. Thus, the facility has a maritime nexus.

In rejecting a position that the presence or absence of non-maritime buildings between the point of injury and the water as an absolute test in deciding whether an injury is covered by the Act, the Fifth Circuit concluded that the character of surrounding properties is only one factor to be considered in an analysis of "adjoining areas." *Winchester*, at 513. The Court has also rejected the proposition that only the narrow strip of facilities physically touching the water can be a maritime situs. *Id.*, at 514; *See Alabama Dry Dock & Shipbuilding Co. v. Kininess*, 554 F.2d 176 (5th Cir. 1977), *cert. denied*, 434 U.S. 903, 98 S.Ct. 299 (1977).

In *Kininess*, the Court found that the physical distance of the locus of injury, a back lot crane storage area, to water was not decisive in finding situs coverage. *Id.*, at 178. The test applied was whether the situs was within a contiguous area which adjoins the water. The court concluded that the back lot was part of the shipyard which was considered a maritime situs since the buildings separating the back lot from the waterway were used for shipbuilding. *Id.*

Furthermore, the Fifth Circuit's view of what constitutes the boundaries of an "area" is one defined by function. The area must be one "customarily used by the employer in loading, unloading, repairing or building a vessel." It is noted that the statute "does not require that the area's exclusive use be for maritime purposes so long as it is customarily used for significant maritime activity." *Winchester*, at 515. Consequently, the court held that a gear man who maintained gear rooms in the employer's storage and maintenance facility located not on, but close (five blocks) to its ship channel docks, was injured on a covered situs, reasoning that the gear room was as close to the docks as was feasible and had a substantial nexus to the waterway. *Id.*, at 506-507, 515. Similarly, the rail line on which

Claimant was injured was located on the premises of Employer's facility, which I have found to have a maritime nexus, and close to the navigable waterway. In fact, the rail line is separated from the waterway by buildings which themselves are used for unloading raw materials and loading finished product. Thus, I find and conclude that Employer's facility, including its rail line, is an adjoining area under the Act since it is customarily used for maritime activity, the loading and unloading of vessels.

In addition to the foregoing, in light of *Caputo*, it is not essential that I find Claimant was injured while actually engaged in maritime tasks. As the Supreme Court explained in *Caputo*, Congress, in amending the Act in 1972, intended to resolve the problem of employees walking in and out of coverage during their workday by providing continuous coverage to workers "whose employment is such that they spend at least some of their time in indisputably longshoring operations and who, without the 1972 Amendments, would be covered for only pat of their activity. *Caputo*, at 273. Thus, to conclude that a worker like Claimant, who spends 50% of his work time loading and unloading barges and vessels, is covered only if he is injured while engaged in such maritime activity would accentuate the "walking in and out of coverage" that Congress intended to eliminate. *Id.*, at 274.

Thus, the broad interpretation applied to "area" in *Winchester* must also be applied here since to do so will reduce the number of employees walking in and out of coverage. Accordingly, I find and concluded that Claimant has fulfilled the situs requirement of the Act.

B. Status

The status requirement of Section 2(3) limits coverage to "employees," defined as those engaged in "maritime employment." Section 902(3) provides in pertinent part:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder and shipbreaker…

33 U.S.C. § 902(3).[6] Accordingly, a claimant may establish status by showing that he is engaged in one of the activities listed in Section 902(3).

The Supreme Court has "clearly decided that, aside from the specified occupations, land-based activity occurring within the Section 903 situs will be deemed maritime only if it is an integral or essential part of loading or unloading a vessel." *Chesapeake and Ohio Railway Company v. Schwalb*, 493 U.S. 40, 45, 110 S.Ct. 381, 384 (1989)[7]; *Munguia v. Chevron U.S.A., Inc.*, 999 F.2d 808, 811 (5th Cir. 1993).

However, contrary to the Employer/Carrier's assertions that Claimant must be engaged in maritime employment at the time of injury, several Supreme Court and Circuit Court decisions interpreting Section 902(3) have not limited the status requirement to the activities listed in this section. A person is "engaged in maritime employment"

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[6] Section 902(3) further lists several examples of individuals who are not engaged in maritime employment, none of which are relevant here.

[7] *See also Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 415-416, 105 S.Ct 1421, 1423-1424 (1985) ("Congress did not seek to cover all those who breathe salt air. Its purpose was to cover those workers on the situs who are involved in the essential elements of loading and unloading; it is clear that persons who are on the situs but not engaged in the overall process of loading and unloading vessels are not covered." (Quoting *Caputo*, 432, U.S. 249, 267, 97 S.Ct. 2348, 2358-2359 (1977).

under the Act if (1) he is engaged in maritime work at the moment of his injury, or (2) if he is not so engaged at the moment of his injury, he is nonetheless covered if he spends at least some of his working time for his employer engaged in maritime work. *See P. C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69, 83 n. 18, 100 S.Ct. 328, 337 n. 18 (1979); *Caputo*, 432 U.S. at 273-274, 97 S.Ct. at 2361-2163; *Winchester*, 632 F.2d at 516; *See Lewis v. Sunnen Crane Service, Inc.*, 31 BRBS 34, 39 (1997).

Although an employee is covered if some portion of his activities constitute covered employment, those activities must be more than "episodic, momentary or incidental to non-maritime work." *Boudloche v. Howard Trucking Co.*, 632 F.2d 1346 (5th Cir. 1980), *cert. denied*, 452 U.S. 915, 101 S.Ct. 3049 (1981). In the present matter, the parties have stipulated that during the year before his injury Claimant's maritime duties of loading and unloading vessels constitute 40-51% of his work assignments. (JX-1). I find the factual stipulation clearly supported by the record as summarized above. Moreover, it is apparent based on Claimant's uncontradicted and credible testimony, that he had a 50% daily expectation of being assigned to maritime work. Thus, he was subject to regular maritime work assignments which cannot be considered "episodic, momentary or incidental" to non-maritime work. *See McGoey v. Chiquita Brands International*, 30 BRBS 237, 239 (1979).

Therefore, in view of the foregoing, I find and conclude that Claimant is a covered employee who meets the status test of Section 2(3) based on the overall indisputably maritime nature of his work assignments and duties. *See generally Lennon v. Waterfront Transport*, 20 F.3d 658, 660-661 (5th Cir. 1994).

V. SECTION 14(e) PENALTY

Section 14(e) of the Act provides that if an employer fails to pay compensation voluntarily within 14 days after it becomes due, or within 14 days after unilaterally suspending compensation as set forth in Section 14(b), the Employer shall be liable for an additional 10% penalty of the unpaid installments. Penalties attach unless the Employer files a timely notice of controversion as provided in Section 14(d).

In the present matter, Employer became aware of Claimant's injury on January 16, 1994, and commenced payments of temporary total disability benefits under the Texas State Compensation Act at a compensation rate of $464.00 per week for 41 1/7 weeks through October 7, 1994. Thereafter, Employer/Carrier began payments of $325.00 per week for 174 weeks for permanent partial disability benefits under the Texas State Compensation Act. Employer filed a Notice of Controversion on July 22, 1996.

In accordance with Section 14(b) of the Act, Claimant was owed compensation on the fourteenth day after Employer was notified of his injury. Thus, Employer was liable for compensation on January 30, 1994. Since Employer controverted Claimant's right to compensation under the Act, Employer had an additional fourteen days to file such a notice with the District Director. *Frisco v. Perini Corp. Marine Division*, 14 BRBS 798, 801 n. 3 (1981). A notice should have been filed by February 13, 1994 to be timely and prevent the application of penalties.

Payments of compensation under a state act do not excuse the failure to file a notice of controversion under the longshore act. *Spear v. General Dynamics Corp.*, 25 BRBS 132, 136-137 (1991); *See Madden v. Western Asbestos Co.*, 23 BRBS 55, 60 (1989). However, where an employer makes payments under a state act and the claimant is ultimately awarded compensation under the Act greater than

the amount received voluntarily, the employer's liability under Section 14(e) is based solely on the difference. *Id.*; *Dygert v. Manufacturer's Packaging Co.*, 10 BRBS 1036, 1046-1047 (1979).

Therefore, Employer is liable for penalties in accordance with Section 14(e) of the Act from February 13, 1994 until July 22, 1996, based on the difference between the payments made under the Texas State Compensation Act and payments due and owing under the Act.

VI. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. *Avallone v. Todd Shipyards Corp.*, 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport news v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that "...the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills..." *Grant v. Portland Stevedoring Company, et al.*, 16 BRBS 267 (1984). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. See *Grant v. Portland Stevedoring Company, et al.*, 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

VII. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VIII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer/Carrier shall pay Claimant compensation for temporary total disability from January 17, 1994 through October 7, 1994 based on Claimant's average weekly wage of $1,247.06, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b)

2. Employer/Carrier shall pay Claimant the sum of $230,349.60 as compensation for a 100% scheduled permanent partial disability to Claimant's left arm based on an average weekly wage of $1,247.06 and a compensation rate of $738.30 for 312 weeks pursuant to Section 908(c)(1), in accordance with the provisions of Section 8(c) of the Act. 33 U.S.C. § 908(c).

3. Employer/Carrier shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's January 16, 1994, work injury, pursuant to the provisions of Section 7 of the Act.

4. Employer shall be liable for an assessment under Section 14(e) of the Act to the extent that installments of compensation were found to be due and owing from February 13, 1994 until July 22, 1996, as provided herein.

5. Employer/Carrier shall receive credit for all compensation heretofore paid, as and when paid.

6. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); *Grant v. Portland Stevedoring Co., et al.*, 16 BRBS 267 (1984).

7. Claimant's attorney shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 13th day of March, 1998, at Metairie, Louisiana.

/s/ Lee J. Romero, Jr.
Administrative Law Judge

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 99-60273

MOBIL MINING & MINERALS; INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA

Petitioners

v.

DAVID R. NIXSON; DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS, US DEPARTMENT OF LABOR

Respondents

Petition for Review of an Order of the
Office of Workers Compensation Programs &
the U.S. Department of Labor

ON PETITION FOR REHEARING

Before GARWOOD, WIENER, and DENNIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is *Denied.*

ENTERED FOR THE COURT:

/s/ James L. Dennis
United States Circuit Judge

Benefits Review Board
United States Department of Labor

LEE C. GAVRANOVIC,

Claimant-Respondent

v.

MOBIL MINING AND MINERALS

and

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,

Employer/Carrier-Petitioners

TOMMIE L. JONES,

Claimant-Respondent

v.

MOBIL MINING AND MINERALS
and
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,

Employer/Carrier-Petitioners

BRB No. 98-741
BRB No. 98-750
February 23, 1999

DECISION and ORDER

Dennis L. Brown and Mike N. Cokins, Houston, Texas, for claimants.

Thomas C. Fitzhugh III, J. Corbin Van Arsdale and Matthew H. Ammerman (Fitzhugh & Elliott, P.C.), Houston, Texas, for employer/carrier.

BEFORE: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decisions and Orders Granting Benefits (96-LHC-1932, 96-LHC-1954) of Administrative Law Judge James W. Kerr, Jr., rendered on two claims filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (the Act).[1] We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. § 921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer is a fertilizer manufacturer whose facilities adjoin the Houston Ship Channel. Jt.Cl.Ex. 4.[2] It receives raw materials (sulphur, anhydrous ammonia, phosphate rock, and sulfuric acid) by truck, railway and barges, and it produces sulfuric acid, phosphoric acid, ammonium

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[1] These cases were consolidated for purposes of the hearing before the administrative law judge, but separate decisions were issued. Due to the similarity of issues, we hereby consolidate them formally for decision. 20 C.F.R. § 802.104(a).

[2] Jt.Cl.Ex. indicates Joint Claimants' exhibits; Emp.Ex. J and Cl.Ex. J identify Employer's and Claimant's exhibits in the *Jones* case; Emp.Ex. G and Cl.Ex. G identify Employer's and Claimant's exhibits in the *Gavranovic* case.

thiosulfate (liquid fertilizer), and two grades of solid fertilizer called dioammonium phosphate and monoammonium phosphate. Tr. at 281, 283. According to Ernest Gardner, a former area supervisor in shipping and receiving for employer who is now retired, the sulphur arrives by trucks, the ammonia and phosphate rock arrive by barge, and the sulfuric acid arrives by both railway and barges. With the exception of the sulfur, all materials are unloaded from their respective modes of transportation by employer's operators. *Id.* at 281. The finished product is shipped out by railway or trucks 80-85 percent of the time and by barges or ships 15-20 percent of the time. *Id.* at 284. Employer's personnel in "Shipping and Receiving" are divided into various "classes" of operators with "A" operators having the most seniority as well as being qualified for the most jobs.

Claimant Jones has worked for employer for over 23 years. He has spent over 13 years on the shipping docks and over 11 years as an "A" operator. Tr. at 209-210. As an "A" operator, Mr. Jones regularly worked the overhead cranes in Buildings 9 and 10,[3] unloaded the ammonia barges, operated the marine loader, loaded the "thio" barges, unloaded the acid barges, operated the Buhler[4] to unload the rock barges, and worked the acid rack. Tr. at 215. He also performed class "B" and "C" operator jobs when required or when he

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[3] Buildings 9 and 10 sit adjacent to the Houston Ship Channel and they act as storing houses for the finished product (fertilizer). However, from Building 9, fertilizer is loaded by crane onto a conveyor belt which leads to the dock where a marine loader loads it onto barges or other sea-going vessels for shipment. From Building 10, fertilizer is loaded onto trucks or rail cars, or is transferred to Building 9 to replenish its supply.

[4] A Buhler is a scooping apparatus used to remove rock from barges. A front- end loader is on the barge to pile the rock for the Buhler to pick up.

switched with "B" or "C" men to provide them with training on the "A" jobs. Tr. at 212-214, 216. On August 6, 1994, Mr. Jones was working in Building 10 as a rail helper, a class "C" job. He crossed the end of a hopper car and started to step off when his foot slipped, resulting in a fractured left foot. Emp.Ex. J 1; Tr. at 216. Mr. Jones received medical treatment, and state workers' compensation benefits, and eventually returned to work in his usual job. Cl.Ex. J 1; Tr. at 216-217. Thereafter, he filed a claim for benefits under the Act.

Claimant Gavranovic started as a laborer hired to clean the shipping docks for employer. He later bid into operations and became a "C" operator. As a "C" operator, he was qualified to wash out hopper cars, act as a rail helper, and control railroad switching. Tr. at 51. Based on his experience and training, he also was qualified to perform some class "B" and "A" jobs. He testified he often worked as a "B" operator driving a front-end loader both in the rock barge and in Building 9, and, prior to his injury on February 6, 1996, he trained on and became qualified to perform certain "A" jobs such as driving the diesel locomotive, working in Buildings 9 and 10, and relieving "A" operators on the marine loader and the Buhler.[5] Tr. at 51-52, 54. On February 6, 1996, Mr. Gavranovic was working inside a railroad hopper car cleaning product off the car with a chipping gun when a piece of debris fell from the top of the car onto his foot. His injury also resulted in a fractured left

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[5] Sometime in 1996 after Mr. Gavranovic's injury, the company instituted a new policy, changing some of the "A" jobs to "B" jobs. Jt.Cl.Ex. 24 at 14; Tr. at 53. The new policy also created a more formalized training plan whereby "B" and "C" operators could train to become "A" operators. Further, at some point after his return to work, Mr. Gavranovic became a "B" operator. Jt.Cl.Ex. 24 at 10-11.

foot. Emp.Ex. G 1; Tr. at 57-58. Mr. Gavranovic received medical treatment and state workers' compensation benefits and eventually returned to his usual work. Cl.Ex. G 1; Tr. at 60-61. Thereafter, he filed a claim for benefits under the Act.

Claimants and employer agreed that both claimants were injured during the course of their employment, that both claimants received medical and disability benefits pursuant to the Texas Workers' Compensation Act, and that both claimants returned to their regular employment after recovering from their respective injuries. *Jones* Decision and Order at 2-3; *Gavranovic* Decision and Order at 2-3. The parties also stipulated to the duration and amount of temporary total and permanent partial disability benefits to which claimants would be entitled under the Act should the administrative law judge find them to be covered employees. *Id.* at 3. The primary issue before the administrative law judge, therefore, involved coverage under the Act.[6]

The administrative law judge first found that, under the case law of the United States Court of Appeals for the Fifth Circuit, within whose jurisdiction these cases arise, employer's entire facility meets the situs requirement of the Act, 33 U.S.C. § 903(a), as it is in close proximity to the dock area where loading and unloading activities occur, and that Building 10, in which both claimants were injured, is not separate and distinct from the dock area. *Jones* Decision and Order at 12-13; *Gavranovic* Decision and Order at 14-15. With regard to Mr. Jones's status, the administrative law judge found that as an "A" operator, Mr. Jones was subject to regular maritime assignments. He credited Mr. Jones's testimony and found that those assignments included operating the Buhler to unload the rock barges and assisting

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[6] In the *Gavranovic* case, the parties also disputed claimant's average weekly wage.

with the ammonia and thio barges. Further, he credited the documentary evidence which showed that Mr. Jones also ran units 9 and 10 and operated a marine loader. *Jones* Decision and Order at 13-14. Therefore, he found that Mr. Jones "spent at least some of his time" in maritime activity and is covered under Section 2(3) of the Act, 33 U.S.C. § 902(3). *Id.* at 14. Consequently, the administrative law judge awarded Mr. Jones disability benefits under the Act, as stipulated by the parties. *Id.*

With regard to Mr. Gavranovic's status, the administrative law judge found that he, too, was subject to regular maritime assignments. Although Mr. Gavranovic was classified as a "C" operator and not an "A" operator like Mr. Jones, the administrative law judge found that Mr. Gavranovic performed a variety of maritime work, including cleaning the dock area and the conveyor belts, tying up barges, operating the front-end loader in the rock barges, and operating unit 9 in the loading of vessels. Further, the administrative law judge credited Mr. Gavranovic's testimony and the evidence which showed that he was qualified to operate the Buhler and was training on the marine loader. *Gavranovic* Decision and Order at 16. Thus, he found that Mr. Gavranovic also met the status requirement, and he awarded benefits under the Act pursuant to the parties' stipulation, based on an average weekly wage of $926.11. *Id.* at 16-17.

Employer appeals the decisions in these cases. It contends in both instances that its facility is not a maritime situs. Moreover, even if part of the facility could be considered maritime in nature, employer contends that the area where claimants were injured, Building 10, is not a covered situs. Employer also contends that claimants are land-based workers who are not covered employees under the Act. It argues that they do not meet the status requirement as they were not performing maritime work at the time of their

injuries. Claimants respond, urging affirmance of the administrative law judge's findings.

Situs

To be covered under the Act, a claimant must meet both the status requirement of Section 2(3) and the situs requirement of Section 3(a). 33 U.S.C. §§ 902(3), 903(a). Section 3(a) states:

> Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

33 U.S.C. § 903(a)(1994). Coverage under Section 3(a) is determined by the nature of the place of work at the moment of injury. *Stroup v. Bayou Steel Corp.*, 32 BRBS 151 (1998); *Melerine v. Harbor Construction Co.*, 26 BRBS 97 (1992). To be considered a covered situs, a site must have a maritime nexus, but it need not be used exclusively or primarily for maritime purposes. *See Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 12 BRBS 719 (1980) (*en banc*), *cert. denied*, 452 U.S. 905 (1981); *Melerine*, 26 BRBS at 97. The cases at bar arise within the jurisdiction of the Fifth Circuit, which has adopted a broad view of the situs test, refusing to restrict the test by fence lines or other boundaries. *See Sisson v. Davis & Sons, Inc.*, 131 F.3d 555, 31 BRBS 199 (CRT) (5th Cir. 1998). Specifically, the court stated that the perimeter of an "area" is to be defined by function and that the character of surrounding properties is but one factor to be considered. Thus, an area can be considered an

"adjoining area" within the meaning of the Act if it is in the vicinity of navigable waters, or in a neighboring area, and it is customarily used for maritime activity. *Winchester*, 632 F.2d at 504, 12 BRBS at 719; *see also Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978). Using these guidelines, the Fifth Circuit has held that an administrative law judge properly found that a gear room located five blocks from the nearest dock constituted a covered situs because it was in the vicinity of the navigable waterway, it was as close to the docks as feasible, and it had a nexus to maritime activity in that it was used to store gear which was used in loading process. *Winchester*, 632 F.2d at 514-516, 12 BRBS at 726-729.

In the present cases, both injuries occurred on employer's facility in Building 10 which is adjacent to navigable water. Building 10 is used to store finished product and to load rail cars and trucks. When the supply of fertilizer to be transported by barge or vessel in Building 9 runs low, product is transferred from Building 10 to Building 9. Neither building is used in manufacturing or processing fertilizer. Tr. at 117, 120. Employer contends that neither its facility nor Building 10 is a covered situs under the Act for a variety of reasons. We reject this contention. Initially, we reject employer's assertion that we should rely on the definition of "marine terminal" found in the Occupational Safety and Health Administration (OSHA) regulations, 29 C.F.R. § 1917.2(u), as it is inapplicable in light of the fact that the OSHA regulations were not developed at the same time or for the same purpose as the Act. *See Erlenbaugh v. United States*, 409 U.S. 239 (1972); *Powers v. Sea Ray Boats, Inc.*, 31 BRBS 206, 211 (1998).

Further, we decline to impose the more restrictive law established by the United States Court of Appeals for the

Fourth Circuit upon cases arising within the Fifth Circuit, as the Fifth Circuit law is controlling.[7] *Sisson*, 131 F.3d at 555, 31 BRBS at 199 (CRT); *Winchester*, 632 F.2d at 504, 12 BRBS at 719. Under *Winchester*, the definition of "adjoining area" is a broad one. It includes areas in the vicinity of navigable waters which are used for maritime activity. *Winchester*, 632 F.2d at 514-516, 12 BRBS at 726-729, and actual contiguity with navigable waters is not required. *Sisson*, 131 F.3d at 557, 31 BRBS at 200 (CRT). Thus, the geography and the function of an area are of utmost importance. *Stroup*, 32 BRBS at 154. The administrative law judge in this case found that Building 10 is "in close proximity" to the docks and that they are not "separate and distinct" areas. *Gavranovic* Decision and Order at 14; *see*

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[7] *See Parker v. Director*, OWCP, 75 F.3d 929, 30 BRBS 10 (CRT) (4th Cir. 1996), *cert. denied*, 117 S.Ct. 58 (1996); *Sidwell v. Express Container Services, Inc.*, 71 F.3d 1134, 29 BRBS 138 (CRT) (4th Cir. 1995), *cert. denied*, 518 U.S. 1028 (1996). The Fourth Circuit has held that the situs test is limited to a strict interpretation of the language of the Act. In *Sidwell*, the Fourth Circuit held that a covered situs under the Act must actually adjoin navigable waters; *i.e.*, it must be contiguous to and actually touch the navigable water. With regard to "other adjoining areas," the court stated that non-enumerated areas must be similar to the enumerated ones and must be customarily used for maritime activity. Thus, the raison d'etre for the facility or structure must be for use in connection with the navigable waters. *Id.*, 71 F.3d at 1138-1139, 29 BRBS at 142-144 (CRT). Following its decision in *Sidwell*, the Fourth Circuit held that an injury sustained in a steel fabrication plant by an employee fabricating steel for an inland bridge did not occur on a covered situs. It held that the steel plant, located 1000 feet from the river, did not meet the geographical test and was not a facility the purpose of which was to serve the navigable water. *Jonathan Corp. v. Brickhouse*, 142 F.3d 217, 32 BRBS 86 (CRT) (4th Cir. 1998), *cert. denied*, 119 S.Ct. 590 (1998). In any event, this reasoning would not dictate a contrary result in these cases, as employer's facility actually adjoins navigable waters and is used for loading and unloading vessels.

also Jones Decision and Order at 12-13. Moreover, although he noted that Building 10 is not used directly to load vessels, he reasoned that his conclusion that the two areas are not separate and distinct is supported by the facts that conveyor belts link Building 10 to other areas, and fertilizer is transferred from it to Building 9 when Building 9 needs more fertilizer for shipments on vessels. Thus, he stated that because of its proximity to the water and because the facility is "customarily used" for maritime purposes (albeit not exclusively), employer's entire facility is an "adjoining area" pursuant to Section 3(a) under the Fifth Circuit's interpretation in Winchester. *Gavranovic* Decision and Order at 14-15; *see also Jones* Decision and Order at 12-13.

In a recent case arising within the jurisdiction of the Fifth Circuit, the Board affirmed the administrative law judge's finding that a worker injured in a warehouse shipping bay at a steel manufacturing plant was not injured on a covered situs. *Stroup*, 32 BRBS at 155. The Board stated that the shipping bay, which was used to store steel and to load trucks which then transported the steel overland or carried it to barges or rails for further shipment, did not serve a maritime function, agreeing with the administrative law judge who stated that "there is nothing inherently maritime about storing and loading steel onto trucks...." *Stroup*, 32 BRBS at 154. This lack of a maritime function in conjunction with the shipping bay's distance from the employer's dock facility where loading and unloading occurred,[8] led the Board to conclude that an injury in the shipping bay, even while loading a truck with steel bound for a barge, did not occur on a covered situs because it met neither the geographic nor the function criterion of

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[8] The warehouse/shipping bay was situated 1/4 to 1/2 mile from the docks, separated therefrom by a levee and a public road.

Winchester. *Stroup*, 32 BRBS at 154-155; *see also Melerine*, 26 BRBS at 101.

The instant cases are distinguishable from *Stroup*. Although the facility at which claimants herein work is a manufacturing operation, and the building in which they were injured is not directly involved with the loading or unloading of barges or vessels, part of employer's business involves sending and receiving goods by barges or vessels-a distinctly maritime activity. Moreover, the geography of the facility herein can be distinguished from the facility in *Stroup*, as here, the entire facility and the building in question are adjacent to navigable water and to the docks where barges are loaded and unloaded. *See* Jt.Cl.Ex. 4. In light of the location of employer's facility and because significant maritime activity (loading and unloading barges) occurs on the docks at employer's facility, we affirm the administrative law judge's determination that claimants' injuries in these cases occurred on a covered situs. *Smith v. Universal Fabricators, Inc.*, 21 BRBS 83 (1988), *aff'd*, 878 F.2d 843, 22 BRBS 104 (CRT) (5th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990); *Winchester*, 632 F.2d at 504, 12 BRBS at 719.

Status

Employer next argues that neither claimant satisfies the status requirement. Specifically, employer argues that both Mr. Jones and Mr. Gavranovic are land-based workers and neither was engaged in maritime activity at the time of his injury; therefore, the administrative law judge should not have awarded benefits. Generally, a claimant satisfies the "status" requirement if he is an employee engaged in work which is integral to the loading, unloading, constructing, or repairing of vessels. *See* 33 U.S.C. § 902(3); *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96 (CRT) (1989). To satisfy this requirement, he need only "spend at least some of [his] time in indisputably longshoring operations." *Northeast Marine Terminal Co. v. Caputo*, 432

U.S. 249, 273, 6 BRBS 150, 165 (1977); *Boudloche v. Howard Trucking Co.*, 632 F.2d 1346, 12 BRBS 732 (5th Cir. 1980), *cert. denied*, 452 U.S. 915 (1981). Under Fifth Circuit law, a claimant also may satisfy the status requirement by fulfilling the "moment of injury" test; that is, by being engaged in maritime employment at the time of injury. *Universal Fabricators, Inc. v. Smith*, 878 F.2d 843, 22 BRBS 104 (CRT) (5th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990); *Thibodaux v. Atlantic Richfield Co.*, 580 F.2d 841, 8 BRBS 787 (5th Cir. 1978), *cert. denied*, 442 U.S. 909 (1979); *Scott v. Tug Mate, Inc.*, 22 BRBS 164 (1989).

We reject employer's arguments regarding the status of each of these employees. Initially, we note the error of employer's argument that because neither claimant was performing maritime work at the time of his injury, neither satisfies the status requirement. To the contrary, the Fifth Circuit uses the "moment of injury" test not to narrow but to broaden coverage under the Act. *See McGoey v. Chiquita Brands International*, 30 BRBS 237 (1997); *Thornton v. Brown & Root, Inc.*, 23 BRBS 75 (1989); *Henry v. Gentry Plumbing*, 18 BRBS 95 (1986). Therefore, the fact that both claimants herein were injured during the course of performing non-maritime work is insufficient in and of itself to deny them coverage. *See Caputo*, 432 U.S. at 273, 6 BRBS at 165 (a claimant cannot be excluded because of activities performed at the time of injury as the "status" test is occupational in nature).

With regard to the occupational nature of their work, we affirm the administrative law judge's conclusion that both claimants regularly engage in maritime work. The administrative law judge credited the testimony of both claimants and, although Mr. Jones, as an "A" operator, has more duties listed in his job description which constitute maritime work, Mr. Gavranovic clearly testified and established to the satisfaction of the administrative law judge

that he, too, performed some of those same duties on a regular basis. For instance, both testified that they participated in loading fertilizer from unit 9. Specifically, Mr. Gavranovic stated that he controlled/monitored everything therein, except he did not operate the crane - he worked the screens, the elevator, the conveyor belts, cleaning debris when necessary, and Mr. Jones stated that, if assigned to Building 9, he would most likely be operating the crane. Tr. 56-57, 215-216, 220. Further, they both testified that they used the marine loader on the docks to load out-bound fertilizer onto barges and vessels, and they unloaded phosphate rock from in-coming barges. Tr. at 54, 89, 99, 215-216, 220; *see also* Jt.Cl.Ex. 2 at 18, 26. Moreover, the administrative law judge noted employer's concession that Mr. Jones had loaded and unloaded barges and that Mr. Gavranovic unloaded barges. This evidence is sufficient to support the administrative law judge's conclusion that claimants loaded and unloaded vessels "at least some of the time" and, therefore, meet the status requirement of Section 2(3). *Schwalb*, 493 U.S. at 40, 23 BRBS at 96 (CRT); Caputo, 432 U.S. at 249, 6 BRBS at 150; *Boudloche*, 632 F.2d at 1346, 12 BRBS at 732. As both claimants are covered employees, we affirm the administrative law judge's awards of benefits.

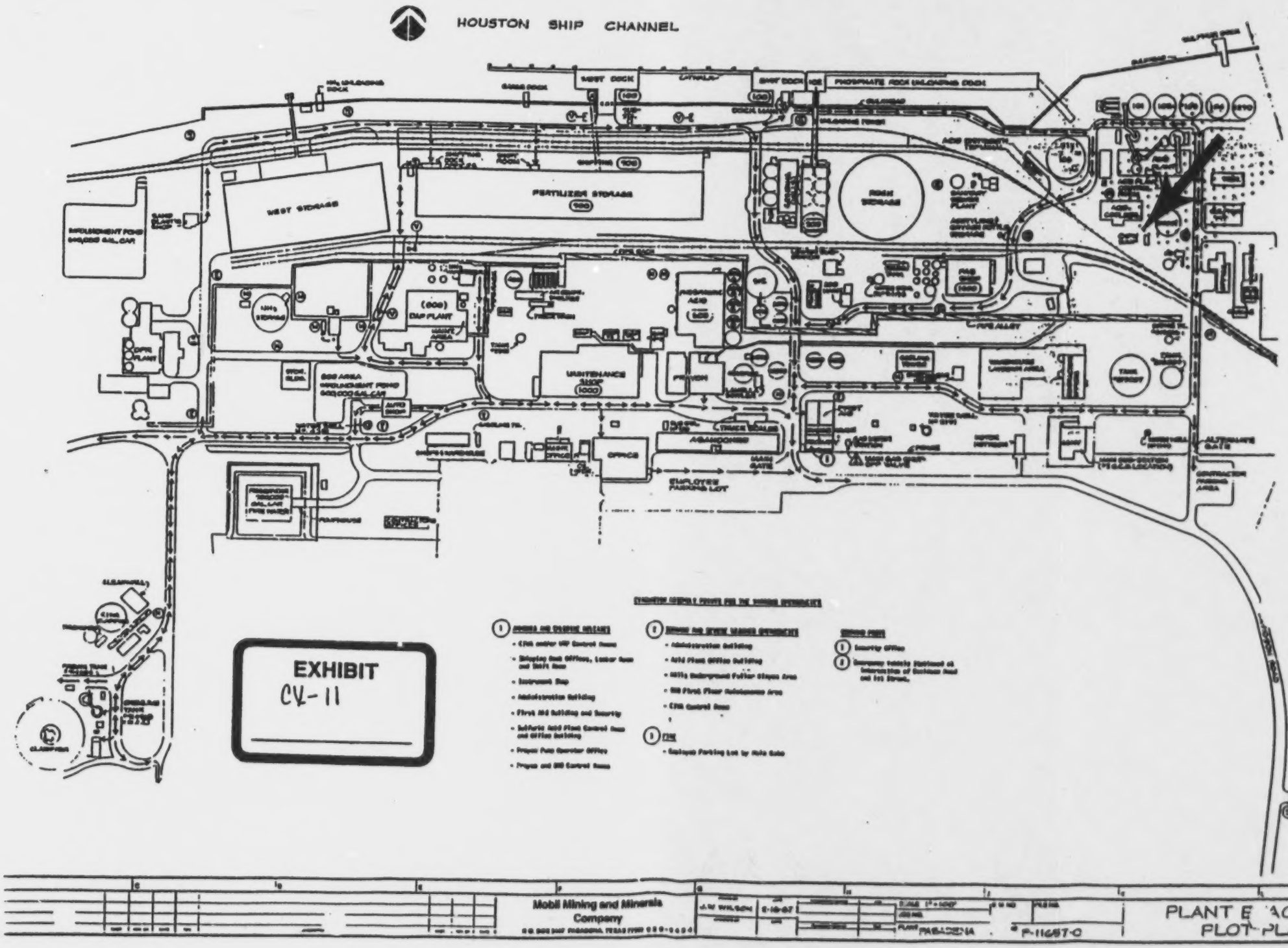
Accordingly, the administrative law judge's decisions awarding benefits are affirmed.

SO ORDERED.

/s/ Betty Jean Hall
Chief Administrative Appeals Judge

/s/ Roy P. Smith
Administrative Appeals Judge

/s/ Regina C. McGranery
Administrative Appeals Judge



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No. 00-44

IN THE

Supreme Court of the United States

MOBIL MINING & MINERALS,

Petitioner,

v.

DAVID R. NIXSON AND DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS,
U.S. DEPARTMENT OF LABOR,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT DAVID R. NIXSON

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STATEMENT OF THE CASE

Petitioner's claim

The Petitioner, Mobil Mining & Minerals ("Mobil"), has filed a Petition for Writ of Certiorari alleging a conflict of opinions between the United States Court of Appeals for the Fifth Circuit and the Fourth Circuit involving the determination of the issue of what is a covered "situs" under § 903(a) of the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 903(a). The Respondent, David R. Nixson, would contend that there is not a legal conflict between the Circuits in their interpretation of § 903(a) of the LHWCA; the present case involves facts significantly dissimilar to those reviewed by the Fourth Circuit. The Petitioner seeks to have the Courts base their analysis of the "situs" issue by reviewing the pinpoint site of the accident, instead of the "area" as dictated by the plain language of § 903(a) of the LHWCA. Such a "pinpoint" review of the accident site is contrary to the intent of Congress in amending the LHWCA in 1972, and to the prior holdings of this Honorable Court.

Relevant Background Facts

Mobil Mining & Minerals ("Mobil") operates a fertilizer manufacturing plant in Pasadena, Texas, located directly on the Houston Ship Channel. In order to operate this facility, Mobil imports over 900,000 tons of phosphate rock which is transported to its facility solely in barges which are unloaded at the plant's docking facilities. Nixson testified that without the import of this phosphate rock via maritime commerce, this plant would not be able to function. (Tr., p. 36). Mobil also imports other raw materials including

ammonia and sulfuric acid by barge, as well as by rail and truck. All of these raw materials are intrical in the manufacturing process being conducted by Mobil. Mobil exports three grades of finished fertilizer product by barge, rail and truck (Pet. App. 4a, 20a), also exports sulfuric acid (Tr., p. 43). The Mobil yearly (Cx. 23 – App. B) and ten year accounting of shipments (Cx. 24 – App. B) illustrates the volume of maritime imports/ exports.

Mr. Nixson was an A operator who performed various marine associated jobs on Mobil's dock facilities, such as: operating the marine loader (fertilizer spreader), operating the buhler (phosphate rock discharge), operating the overhead crane in the warehouse exporting fertilizer by barge, unloading ammonia barges, unloading acid barges, and loading thio (liquid fertilizer) barges. (Pet. App. 13a).

Nixson testified that although he would be assigned a specific function on a daily basis, there had been numerous occasions when he had been called off an assigned job during the normal course of an 8-hour shift to perform work directly on the waterfront. This included relieving other employees for lunch breaks and restroom breaks, or in the event of an emergency, such as the arrival of an unexpected barge, which happened frequently. (Tr., p. 90; Pet. App. 14a).

Nixson identified Mobil's facility from an aerial photograph (Cx. 7 – App. A) and blueprint map (Cx. 11). The 900,000 tons of phosphate rock unloaded yearly is performed at the phosphate rock unloading dock, where it is unloaded by a machine called the "buhler"; the east dock is where sulfuric acid and thio barges are loaded and unloaded; the west dock is where finished fertilizer is loaded into barges or vessels. The waterfront facility also contains an ammonia unloading dock where ammonia barges are unloaded. (Pet. App. 14a).

Mr. Nixson described other facilities along the waterfront which include the west storage area (building 10) where dry fertilizer is stored, and the fertilizer storage area (building 9) where additional dry fertilizer is stored for loading into barges and ships. In the fertilizer storage (building 9) the Employer maintains overhead cranes which are used for the loading of vessels through a conveyer system that connects building 9 to the loading dock area. The conveyer system deposits the fertilizer product into the barges via a marine loader apparatus. Both the west storage and fertilizer storage areas are fronted on each side by railroad tracks; one set of railroad tracks is located between the dock area and the front portion of the storage buildings, the second set of tracks run behind the storage area. (Pet. App. 14a).

The phosphate rock is taken out of barges by the buhler and placed onto a series of conveyers which transports the phosphate rock into silos for storage and a rock storage facility, identified on the map (Cx. 11) as rock storage and building 200. Nixson testified that there are various pipelines that run from the plant onto the dock area where the ammonia and sulfuric acid are offloaded and pumped into the plant.

Additionally, Mobil offloads sulfuric acid from its east dock and pumps it directly to a third party company named Air Products, whose property is located adjacent to Mobil's but has no waterfront area or dock access. Mr. Nixson testified that Mobil receives payment for this import of sulfuric acid to Air Products, Inc. After Air Products uses the sulfuric acid as a drying agent in their processing, they return the altered sulfuric acid to the Employer for its use in its manufacturing process. (Pet. App. 15a). Therefore, Mobil's representation that the Mobil plant is not a transshipment place or intermodal for cargo is not entirely

correct, since it ships the ammonia acid directly to a third party (Air Products, Inc.) Also, as Mr. Nixson testified he can recall at least on one occasion where railcars were loaded at the facility and thereafter sent out to a third party docking area to be loaded on ships. (Tr., p. 107).

Mr. Nixson, on the date of his accident, was assigned to work on the locomotive crew moving railcars and keeping the units (presumably building 9 and building 10) supplied with railcars to load. His duties also included moving loaded railcars out onto other tracks (behind building 9 and building 10). Mr. Nixson identified the railcar and track area where he was injured as located behind buildings 9 and 10 and near the rock storage tanks to the east. (Tr., p. 109 and 111; Pet. App. 20a). The distance from the site of injury to the waterfront area is not reflected in the record. Mr. Nixson testified that he was attempting to couple cars together for purposes of pushing them back to the storage tracks when his accident occurred.

Respondent would note that Mr. Nixson's description of the area of his accident is slightly different than the arrowed portion of Cx. 11. Mobil's contention that the rail lines are separated from the waterfront areas of the Mobil premises is inaccurate. The map provided in the Petitioner's Brief (Cx. 11) and the aerial photograph provided by the Respondent (App. A) clearly depicts the Mobil premises and shows that the rail line enters the Employer's premises and drops down right onto the waterfront area, directly adjacent to the water and dock facilities. The other spur of the rail line cuts off and moves directly behind all of the rock storage and fertilizer storage areas, which are buildings that clearly are classified as marine storage facilities.

Lower Court Proceedings

Mr. Nixson filed a claim for benefits under the LHWCA. (Pet. App. 10a). Mobil defended his claim by challenging the status and situs qualifications of the Claimant stating that the injury did not occur on a covered situs. The Administrative Law Judge (ALJ) analyzed the situs issue by reviewing the decisions of the U.S. Court of Appeals Fifth Circuit on this issue. The ALJ noted factors which have been considered in determining whether a site is an adjoining area as including: the particular suitability of the site for maritime use as referred to in the statute; whether adjoining properties are devoted primarily to use in maritime commerce; proximity of the site to the water; and whether the site is as close to the water as is feasible given all the circumstances. *Arjona v. Intraport Maintenance Company, Inc.*, 31 B.R.B.S. 86 (1997); *Texports Stevedore Company v. Winchester*, 632 F.2d 504 (5th Cir. 1980), *cert denied*, 452 U.S. 905 (1981).

The ALJ specifically rejected Mobil's contention that the presence or absence of non-maritime buildings between the point of injury and the water was an absolute test for whether an injury is covered under the Act. The ALJ cited the Fifth Circuit's decision that the character of surrounding properties is only one factor to be considered in an analysis of "adjoining areas". *Winchester* at 513. The ALJ noted the Fifth Circuit also rejected the proposition that only the narrow strip of facilities physically touching the water can be a maritime situs. *Id.* at 514; *Alabama Dry Dock and Shipbuilding Company v. Kininess*, 554 F.2d 176 (5th Cir. 1977), *cert denied*, 434 U.S. 903 (1997). In *Kininess*, the Fifth Circuit found that the physical distance of the locus of injury (a back lot crane) to the water was not decisive in finding situs coverage. *Id.* at 178. The test applied was whether the situs was within a contiguous area which adjoins the water.

The ALJ also cited the Fifth Circuit's view of what constitutes the boundaries of an "area" as one defined by function. The area must be one "customarily used by the employer in loading, unloading, repairing or building a vessel". It was noted that the statute "does not require that the area's exclusive use be for maritime purposes so long as it is customarily used for significant maritime activity". *Winchester* at 515.

Therefore, the ALJ determined that the Employer's site on the Houston Ship Channel was suitable for its receipt of raw materials necessary for use in its manufacturing process, and shipment of its final product via maritime commerce to its customers; stating:

> The docks located along the waterway service Employer's maritime receipt of manufacturing materials and are certainly adjoining navigable waters. Such docks are also connected to storage and manufacturing areas by conveyer belt systems to facilitate receipt and shipment. Employer's facility is situated on the Houston Ship Channel and arguably could not have been located any closer to the waterway. The proximity of its location is a benefit to Employer given its maritime receipt and shipment activity. I find and conclude the Employer's facility is in the vicinity of navigable waters and used to load and unload vessels. Thus, the facility has a maritime nexus.

Pet. App. 27a.

The Benefits Review Board reviewed this case at the request of Mobil and determined that the issues raised herein by Mobil were the same situs and status issues raised by the Employer in *Gavranovic*. In *Gavranovic*, the Board rejected Mobil's various arguments and held that under the controlling law in the United States Court of Appeals for the Fifth Circuit, *Winchester*, 632 F.2d at 504, the Employer's entire facility constitutes a covered situs under the Act, especially, in light of its location adjacent to the ship channel, on a navigable waterway, and in light of the current significant maritime activity on the docks at Mobil's facility, loading and unloading barges and ships. Because the present case involved the same facility and the same employee classification and duties as the Board addressed in *Gavranovic*, the Board rejected the Employer's contentions and affirmed the ALJ's findings that the Employer's entire facility is a covered situs pursuant to § 903(a) of the Act. (Pet. App. 7a, 8a). The *Gavranovic* decision is attached as an appendix to the Petitioner's brief. (Pet. App. 37a-49a).

The Administrative Law Judge (ALJ) considered Mobil's arguments and allegations that the Fourth Circuit decisions require a more restrictive view of the facts than the controlling law established in the Fifth Circuit under the *Winchester* decision. The ALJ reviewed the Fourth Circuit cases cited by Mobil in its brief to the ALJ and determined that the *Sidwell* case held that a covered situs under the Act must actually adjoin navigable waters, i.e. it must be contiguous to and actually touch the navigable water. With regard to "other adjoining areas", the Court stated that non-enumerated areas must be similar to the enumerated ones and must be customarily used for maritime activity. Thus, the raison d'etre for the facility or structure must be for use in connection with navigable waters. *Sidwell v. Express*

Container Services, Inc., 71 F.3d 1134 (4th Cir. 1995), *cert denied*, 18 U.S. 1028 (1996). The ALJ also noted that following the *Sidwell* decision, the Fourth Circuit stated in *Jonathan Corp. v. Brickhouse*, 142 F.3d 217 (4th Cir. 1998), *cert denied*, 119 S. Ct. 590 (1998); that a steel plant located 1,000 feet from the river did not meet the geographical test and was not a facility, the purpose of which was to serve the navigable water. The ALJ stated that the reasoning of the Fourth Circuit in these cases would not dictate a contrary result in this case as the Employer's facility actually adjoins navigable waters and is used for loading and unloading vessels. (Pet. App. 45a n.7).

The Decision of the Fifth Circuit

The Fifth Circuit affirmed in a brief unpublished decision stating:

> We have carefully reviewed the stipulated facts regarding both the particular site where the accident occurred and the surrounding area constituting Mobil's facility contiguous to the ship channel in light of the applicable law as set forth in the briefs of counsel to this Court and discussed in oral argument before us. Particularly in light of our standard of review of this case and the seminal case in this Court, *Texports Stevedore Company v. Winchester*, 632 F.2d 504 (5th Cir. 1980, *en banc*); we are convinced that "the area" as distinguished from the pinpoint site of the accident, is a covered situs pursuant to the plain wording of Section 903(a) of the LHWCA.

As Nixson's status was stipulated, his claim is clearly within the coverage of the LHWCA. The decisions of the ALJ and the BRB were therefore affirmed.

REASONS FOR DENYING THE WRIT

The Petitioner, Mobil, is attempting to develop a conflict of opinions between the Circuit courts involving the issue of situs under the LHWCA, by asking the courts to look at the "pinpoint" site of a Claimant's injury as opposed to the "area" involved in a Claimant's injury, as plainly directed by the Act. The clear intent of Congress in the 1972 amendments to the LHWCA was to extend coverage landward to traditional maritime workers to alleviate the inequities of the Act and eliminate the problem of workers walking in and out of coverage during the workday. This congressional intent was clearly affirmed by this Honorable Court in its decision in *Northeast Marine Terminal Company v. Caputo*, 432 U.S. 249 (1997). A review of the cases from both the Fourth and Fifth Circuit Court of Appeals indicates that each court has issued decisions based upon the facts of each specific case, as it relates to the guidelines put forth by the Congress and this Honorable Court under the *Caputo* decision. There is no conflict among the jurisdictions that needs to be addressed by this Honorable Court.

I. THE FIFTH CIRCUIT'S DECISION DOES NOT PERPETUATE A CIRCUIT CONFLICT OVER THE MEANING OF THE PHRASE "CUSTOMARILY USED" IN THE LHWCA.

A. The initial flaw in Petitioner's appeal is that they view themselves as a "manufacturing" facility that is not "specifically" enumerated under the express language of the Act. They object to the Fifth Circuit ruling that their premises, which include five (5) specifically designed loading and unloading areas, is a maritime situs as defined under § 903(a) of the Act; which reads:

> Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel.

The Employer seeks to have this Court review this decision and direct the Fifth Circuit to go back and construct a line through the Employer's premises that will mark a line of jurisdiction which traditional maritime workers under the status test can cross and will no longer be covered under the LHWCA. Respondent objects, this request will violate the law and Congress' intent under the 1972 Amendments, to alleviate a line of demarcation for jurisdiction and allow maritime workers to walk in and out of coverage while performing their normal work duties. Since Mobil's property is contiguous to the waterfront areas, the ALJ, BRB and Fifth Circuit were correct in using its property lines to establish situs.

Petitioner is correct in stating that this is an important issue, but this Court and Congress give all parties clear insight in how to analyze the facts and make a determination. The Administrative Law Judge decision, approved by the Fifth Circuit, is well reasoned under the law and based upon the specific facts of this case. The Petitioner admitted to the Respondent's status, admitted it was a maritime employer (Tr., p. 98), and admits that they have maritime docking facilities which are an intrical part of their premises; used to

unload necessary raw materials (phosphate rock, ammonia, acid), and to load their finished fertilizer product into barges and ships. The Employer has argued that they should be allowed to carve up their premises into maritime areas and state jurisdiction areas. The ALJ and Fifth Circuit ruled that to request the Courts to look at a "pinpoint" site within a contiguous area to determine the question of situs is not what is dictated by the plain language of the Act, nor the decisions of this Court.

The Petitioner wants the Court to begin its review of their situs by starting with the premise that they are a manufacturing plant, which is subject to state jurisdiction, except for select areas of admitted maritime activities. The fallacy of this analysis is that it leads to the creation of a maze of jurisdictional uncertainty as workers walk in and out of coverage each day. Under this analysis the docks, warehouses and pipelines leading to the barges are a covered situs, but the land and rail lines between these areas is not; nor is the land above and around the pipelines used to unload product to storage tanks. As a result, Respondent would be covered as crane operator in Building 9, not covered as he crosses the rails and is covered again once he reaches the dock. Respondent would be covered as a buhler operator unloading phosphate rock, but not if needed to go to the office to check on documents associated with the unloading he is doing; as a maritime (ILA) clerk or worker would do in loading the same vessel.

The Fifth Circuit decision is based clearly on the statutory language of the Act and the rule of law documented by this Court.

B. The Circuits are not split on the issue whether, when part of a manufacturing facility is used for loading or unloading vessels, the entire facility is "customarily used" for such purposes.

When reviewing the issue of situs, each of the Circuits first look to see if any maritime activity is being conducted on the property which adjoins navigable waters; if so, is it customarily used for maritime purposes. The facts of each case are analyzed under the guidelines of the statute but each of the Circuits use different words or phrases to explain their decisions. This does not create a legal conflict. The Petitioner contends that solely because Jonathan Corp. classified itself as a "plant", the Fourth Circuit found that the "raison d'etre" of the properties use did not include a connection to navigable waters enough to qualify as a maritime situs. However, Jonathan Corp.'s status as a plant was not the controlling factor, their rare involvement in maritime commerce determined the issue.

The facts in *Brickhouse* relate that Mr. Brickhouse was a welder for Tidewater Steel (Jonathan Corp.), sometimes welding on components for installation on vessels, but mostly working on maintenance projects. The property was located on the Elizabeth River and had a dock for loading barges. However, Tidewater Steel received *all* of its steel by rail or truck and likewise shipped out most of its fabricated product by rail or truck. From "time to time" large components would be shipped by barge. Only one example was evidenced in the record, the company shipped components of a flight deck by barge to a Navy shipyard. *Brickhouse* at 219. It was also noted that Tidewater Steel did not even have a shoreside crane that could be used for the purpose of conducting loading or unloading. *Id.* at 220.

In ruling that Tidewater's property was not a maritime situs, the Fourth Circuit noted: (1) that while working at Tidewater's plant the employee's work did not routinely take them from within the plant, onto the adjoining water, and back again to the plant; (2) while fabricating, employee's work kept them inside the plant; (3) all steel (raw material) is shipped in by truck or rail; (4) all components (finished product) were shipped out of the plant for installation off Tidewater property; (5) Brickhouse would travel by land to shipyards to install fabricated parts; and (6) Tidewater's location adjacent to the water was "fortuitous" in that it did not load or unload materials or parts as a "customary" course of business. *Brickhouse* at 222. Therefore, it properly denied coverage stating, "The steel fabrication plant where Brickhouse was injured was not a facility, the "raison d'etre" of which is their use in connection "with the nearby navigable waters". *Id.* at 222; *Sidwell* at 1139.

Had Tidewater's facility had the connection to the navigable waters that the evidence in this case attributes to Mobil's premises, the Fourth Circuit would have granted situs jurisdiction. Using the same factual analysis from Brickhouse to the Mobil facts reveals: (1) Nixson and other workers routinely moved from the rail lines and other areas of the plant to the waterfront docks to load and unload barges and vessels (Tr., p. 115); (2) while performing non-maritime work (loading railcars) workers travel right down to the docks and marine warehouses and can be called upon to leave their job and assist in maritime unloading (Tr., p. 90); (3) *all* phosphate rock and a significant amount of ammonia and acid (raw materials) are unloaded by barge (Tr., p. 33, 34, 36); (4) the finished product (fertilizer — MAP, DAP, Thio) is shipped out in significant tonnage by barge and vessel directly from Mobil's working docks; (5) Nixson never

had to leave the property to perform his maritime work; and (6) Mobil's location on the water was not "fortuitous", Nixson testified that without the raw material received by barge the plant could not operate, and its export tonnage would greatly decrease without the shipments by barge and vessel. (Tr., p. 36). Also, unlike Tidewater, Mobil had five (5) separate, functional marine unloading/loading docks that were used in the "customary" operation of the plant. Therefore, the "raison d'etre" of Mobil's plant (producing/ exporting fertilizer) is directly connected to its location on the Houston Ship Channel.

II. THE FIFTH CIRCUIT'S HOLDING COMPORTS WITH CONGRESSIONAL INTENT AND ESTABLISHED CASE LAW

It is agreed that Congress' intent in enacting the 1972 Amendments was to alleviate the problem of longshoremen moving in and out of coverage at the water's edge and to provide uniform coverage. The previous test was a pure situs test, but now with expanded coverage landward, the test for coverage includes both situs and status. This Court in *Caputo* (p. 272) recognized Congress wanted "a uniform" compensation system to apply to employees who would otherwise be covered by the Act for part of their activity. S. Rep. 13; H.R. Rep. 10. It wanted a system that did not depend on the "fortuitous" circumstances of whether the injury [to the longshoreman] occurred on land or over water. S. Rep. 13; H.R. Rep. 10.

This Court further notes "it is not at all clear that the phrase 'customarily used' was intended to modify more than the immediately preceding phrase 'other areas' (*Caputo* at 28); in contradiction to the interpretation advocated by the Petitioner."

The Fifth Circuit in its seminal case, *Winchester*, adopts this Court's interpretation when addressing the issue of where the boundaries to an "area" are under the statute. It is an "area" if it is customarily, not exclusively, used for significant maritime activity. *Winchester* at 515. There is nothing in Congress' comments, the statutory language, nor this Court's decisions that suggest that the term "other adjoining area" was meant to require a "pinpoint" review of the exact site of the injury, as opposed to the Employer's contiguous property line.

The Fourth Circuit in *Sidwell* (p. 1140) states specifically, "although one might be tempted to initially eschew any reliance on conventional property lines in defining 'other adjoining area' we believe that it is inescapable that some notion of property lines will be at least relevant, if not dispositive, in determining whether the injury occurred within a single 'other adjoining area' ".

In fact, by footnote the Fourth Circuit adapts the language of the Fifth Circuit in *Alabama Dry Dock & Shipbuilding Co. v. Kininess*, 554 F.2d 176, 178 (5th Cir.), *cert denied*, 434 U.S. 903 (1977), stating: "In this regard, of course, it is the parcel of land that must adjoin navigable waters, not the particular square foot on that parcel upon which the Claimant was injured." *Sidwell* at 1140.

Therefore, it is quite clear that Congress and both Circuits intended that the term "other adjoining areas" be viewed as a contiguous parcel of property, customarily used by an Employer for maritime purposes; such as the unloading of raw material and the loading of finished product. There is not an inconsistent decision on the issue between the Circuits, nor does the Fifth Circuits' holding in Nixson depart for

Congress' intent in amending the Act in 1972. The ALJ, BRB and Fifth Circuit each held that the loading and unloading being performed at the five dock areas of Mobil's premises was part of their customary function, and the boundary of Mobil's "area" of operations, which adjoined the Houston Ship Channel, consisted of this contiguous parcel of property.

III. THERE IS NOT AN IMPORTANT FEDERAL QUESTION INVOLVING THE TERM "CUSTOMARILY USED" TO BE ADDRESSED BY THE COURT

There is no "vacuum", as alleged by the Petitioner, involving the situs issue created by this Court's prior decisions. The status issues addressed by the Court give us a foundation to review all jurisdictional questions involving the Act. A review of the Courts' status cases (*Schwalb, Herbs' Welding, Perini, P.C. Pfeiffer, Co.,* and *Caputo*) all illustrate that an employee need not be continuously or exclusively engaged in maritime activities to gain status under the 1972 Amendments, as long as they spent at least some of their time in indisputable longshoring activities, and contributed to the process, even if not continuously. The status requirement illustrates that neither Congress, nor this Court intend to draw restrictive, irrational lines to demark maritime jurisdiction. To do so would once again create anomalies in this system that once drew an arbitrary line at the water's edge. These cases illustrate this Court's recognition of Congress' intent not to make the jurisdictional requirements of the Act punishingly restrictive but recognized the inherent mix of activity and structures that would be involved in its landward movement. Congress did not expect that a covered situs would include only maritime structures and activity.

Congress did not intend for the courts to disregard from coverage workers who unload barges at a dock located on the land of a manufacturing company just because the parcel of property included manufacturing buildings. The ten-year comparison charts (App. B) illustrate the volume of maritime activity being conducted on this property.

Following this Court's reasoning on the status issues, it is clear Congress did not intend to require a situs be exclusively and continuously engaged in maritime activities to be qualified as a maritime situs, under the term "other adjoining area". The Circuit Courts agree that the property lines for the contiguous parcel of land, which adjoins the water, and is "customarily" used for loading and unloading, is a reasonable boundary to follow in determining a covered situs. The Fifth Circuit's decision is correct and needs no further review.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — AERIAL PHOTO OF MOBIL MINING & MINERALS PREMISES

APPENDIX B — TRAFFIC MONTHLY REPORT AND TEN YEAR COMPARISON OF RECEIPTS/SHIPMENTS

(Omitted here but submitted separately as Lodging Appendix)

Supreme Court, U.S.
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(3)

No. 00-44

IN THE

Supreme Court of the United States

MOBILE MINING & MINERALS,

Petitioner,

v.

DAVID R. NIXSON and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF MARITIME LAW ASSOCIATION OF THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF GRANTING THE PETITION

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BRIEF OF MARITIME LAW ASSOCIATION OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF GRANTING THE PETITION FOR CERTIORARI OF MOBILE MINING & MINERALS[1]

The Maritime Law Association of the United States (hereinafter "MLA") respectfully submits this brief as *amicus curiae* in support of the Petition for Writ of Certiorari filed by Mobile Mining & Minerals.[2]

INTEREST OF *AMICUS CURIAE*

The MLA is a national bar association founded in 1899, with a membership of approximately 3,600 attorneys, law professors and others interested in maritime law. Its attorney members, most of whom are specialists in admiralty law, represent the full gamut of maritime interests, including shipowners, charterers, stevedores, cargo interests, port authorities, seamen, longshoremen, passengers, marine underwriters, and other maritime claimants and defendants.

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1. This Brief was authored by James Patrick Cooney, attorney for the Maritime Law Association of the United States, and William R. Dorsey, III, President of the Maritime Law Association of the United States. No person or entity other than the Maritime Law Association made a monetary contribution to the preparation or submission of the Brief.

2. The MLA has received and filed concurrently with the filing of this Brief the written consent of Hon. Seth P. Waxman, Solicitor General of the United States; Dennis Brown, Esq., attorney for the Respondent Nixson; and Robert Long, Esq., attorney for the Petitioner.

The objectives of the MLA, as stated in its Articles of Association, are

> to advance reforms in the Maritime Law of the United States, to facilitate justice in its administration, to promote uniformity in its enactment and enforcement, to furnish a forum for the discussion and consideration of problems affecting the Maritime Law and its administration, to participate as a constituent member of the Comité Maritime International and as an affiliated organization of the American Bar Association, and to act with other associations in efforts to bring about a greater harmony in the shipping laws, regulations and practices in different nations.

In furtherance of these objectives, the MLA has supported the enactment of a wide-range of legislation dealing with maritime matters during its 100 years of existence, including the Carriage of Goods by Sea Act,[3] the Federal Arbitration Act,[4] and the Foreign Sovereign Immunities Act.[5] The MLA has also cooperated with congressional committees in the formulation of other maritime legislation.[6]

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3. 46 U.S.C. §§ 1300-1315.

4. 9 U.S.C. §§ 1-16.

5. 28 U.S.C. §§ 1330, 1602-1611.

6. *E.g.*, Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251-1376; Convention of the International Regulations to Prevent Collisions at Sea, 28 U.S.T. 3459, *as amended*, T.I.A.S. 10672; United States Inland Navigation Rules, 33 U.S.C. §§ 2001-2073.

The MLA assists in maritime projects undertaken by agencies of the United Nations, and works closely with the International Maritime Organization ("IMO") in the formulation of uniform international maritime standards. The President of the MLA (or his delegate) serves as a member and legal advisor to the United States delegation to the IMO Legal Committee

The MLA is one of some 54 national maritime law associations constituting the Comité Maritime International,[7] seeking international uniformity in maritime laws through international conventions.

In 1975, prompted by the need for both national and international uniformity in maritime law, the MLA passed a resolution asserting that the MLA "considers it of the utmost importance and in the public interest that maritime law be uniform to the maximum extent possible throughout the United States." In 1986, the MLA by resolution reaffirmed its "support of the importance of maintaining national uniformity in maritime law" and approved "action, subject to the By-Laws, to express such support, including filing amicus briefs and supporting proposed legislation or other action which favors uniformity in maritime law, and opposing proposed legislation or other action which impairs uniformity in maritime law."

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7. Its members include the following countries: Argentina, Australia and New Zealand, Belgium, Brazil, Bulgaria, Canada, Chile, China, Colombia, Costa Rica, Croatia, Czechoslovakia, Denmark, Dominican Republic, Ecuador, Finland, France, Germany, Greece, Iceland, Indonesia, Ireland, Israel, Italy, Japan, Korea, D.P.R. Korea, Malaysia, Malta, Mauritanie, Mexico, Morocco, Netherlands, Nigeria, Norway, Panama, Peru, Philippines, Poland, Portugal, Senegal, Singapore, Slovenia, South Africa, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States, Uruguay, Russia, Venezuela and Yugoslavia.

In promoting the uniformity of maritime law, the MLA is as concerned with the uniform application of maritime law among the various Circuit Courts of Appeals of the United States, as it is with the need for the Maritime Law of United States to be applied uniformly by both state and federal courts and for there to be a uniform approach to international maritime regulation through the growing body of international conventions promulgated by the IMO and joined in by the United States. In furtherance of its policy with regard to uniformity, the MLA has appeared before this Court as *amicus curiae* on numerous occasions to argue in favor of uniformity in the substance and application of the Maritime Law of the United States.[8]

SUMMARY OF THE ARGUMENT

There is a conflict among the United States Circuit Courts of Appeals on whether the coverage of the Longshore and Harbor Workers' Act extends to entire facilities where vessels are loaded and unloaded or to only those specific portions of the facility where the loading and unloading occurs. The MLA desires that the Court grant certiorari to resolve this conflict and, thus, establish uniformity in the laws.

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8. *E.g. Locke v. United States*, __ U.S. __, 120 S. Ct. 1135 (2000); *Bouchard Transp. Co., Inc. v. United States*, 525 U.S. 1171 (1999) (Mem.); *Yamaha Motor Corp., U.S.A. v. Calhoun*, 515 U.S. 1186 (1995); *Exxon Co., U.S.A. v Sofec, Inc.*, 516 U.S. 1091 (1996); *American Dredging Co. v. Miller*, 510 U.S. 443 (1994); *Sisson v. Ruby*, 497 U.S. 358 (1990); *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140 (1989); *OffshoreLogistics, Inc. v. Tallentire*, 477 U.S. 207 (1986); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *Askew v. American Waterways Operators*, 411 U.S. 325 (1973); *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970).

ARGUMENT

This case presents the Court with an opportunity to insure that the Longshore and Harbor Workers' Act, 33 U.S.C. § 901, *et seq.* ("the Act"), is applied uniformly throughout the country.

Coverage under the Act is limited to persons engaged in maritime employment[9] and who are injured or killed in the course of their employment at a covered situs.[10] The scope of the Act, with respect to what constitutes a "covered situs," was expanded in 1972. The 1972 amendments extended the geographical coverage of the Act beyond the waters edge by defining the navigable waters of the United States to include "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel."[11] Congress expanded the geographical coverage of the Act shoreside to avoid the problem of maritime employees literally walking in and out of coverage as they walked up and down the gangplank from ship to shore during the loading and unloading of vessels. However, it is unclear whether Congress intended by this language to extend coverage to an entire manufacturing facility adjacent to a marine terminal or dock.

Many such manufacturing facilities are located in mixed marine and industrial areas built along waterways such as

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9. 33 U.S.C. § 902(3).

10. 33 U.S.C. § 903(a).

11. 33 U.S.C. § 903(a).

the Mississippi River or, as in the case before the Court, the Houston Ship Channel. The fertilizer manufacturing plant operated by Petitioner Mobil Mining and Materials is but one example of the kind of facility at which the traditional maritime activities of loading and unloading vessels occur in conjunction with a manufacturing process. Other examples would include oil and petrochemical refineries built along navigable waterways that have marine terminal facilities to allow for the delivery and shipment of crude oil and refined petroleum products. Such refinery or manufacturing complexes often cover huge geographical areas in which the area devoted to traditional maritime activities is insignificant when compared to the entire contiguous plant area. In such a case, is the entire plant area a covered situs, or is only that portion of the plant area where marine activities are conducted? Put simply, the question is whether a maritime employee is covered by the Act if injured anywhere on the plant premises, or is covered only if injured while in that area within the plant premises "customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel."[12]

As pointed out by the Petitioner, there is a conflict on this issue between the United States Court of Appeals for the Fourth Circuit on the one hand, and the United States Courts of Appeals for the First and Fifth Circuits, on the other. The Fourth Circuit, in the case of *Jonathan Corp. v. Brickhouse*, 142 F.3d 217 (4th Cir.), *cert. denied*, 525 U.S. 1040 (1998), narrowly construed the scope of § 3(a) of the Act by holding that only those areas customarily used for maritime purposes within the larger geographical confines of a manufacturing facility constitute a covered situs.

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12. 33 U.S.C. § 903(a).

However, two decades earlier, the United States Court of Appeals for the First Circuit reached the opposite conclusion. *Prolerized New England Co. v. Benefits Review Bd.*, 637 F.2d 30 (1st Cir. 1980). The facts of *Prolerized New England* reveal that an employee was injured while working on a conveyor belt transporting automobiles and large appliances to be processed into scrap. The scrap metal processing plant was located adjacent to navigable waters where barges were loaded with scrap metal. In holding the employee's injury fell within the Act's coverage, the First Circuit determined that the employee was in an area customarily used by the employer in loading a vessel, even though the location of the conveyor belt was not part of the area devoted to the loading of barges.

In the present case the Benefits Review Board and the Fifth Circuit held, in unreported decisions, that an entire manufacturing plant constituted a covered situs whenever any part of the plant is used to load or unload vessels. The Fifth Circuit relied upon its own earlier *en banc* decision in *Texports Stevedore Co. v. Winchester*, 632 F.2d 504 (5th Cir. 1980) (en banc), in reaching this conclusion.

In joining as an *amicus curiae* with the Petitioner in requesting this Court to grant certiorari, the MLA takes no position on the merits of the issue presented, but rather urges that a uniform national rule be established regarding whether the entirety of a manufacturing facility located adjacent to navigable water at which vessels are loaded and unloaded constitutes a covered situs under § 3(a) of the Act or whether that situs is limited to only those areas within the confines of the facility actually "used by an employer in loading [or] unloading, . . . a vessel." It is the position of the MLA that regardless of the rule to be applied, one rule should be applicable throughout the United States to ensure the uniform application of the Act.

CONCLUSION

The Maritime Law Association of United States respectfully requests that Court grant a writ of certiorari to resolve this important question of uniformity under the Longshore and Harbor Workers' Compensation Act.

Respectfully submitted,

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No. 00-44

In the Supreme Court of the United States

MOBIL MINING & MINERALS, PETITIONER

v.

DAVID R. NIXSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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18pp

QUESTION PRESENTED

Petitioner operates a manufacturing plant that is located on a ship channel. The plant receives raw materials and ships finished products by vessels. Respondent David R. Nixson was injured while working on a rail line within the plant's premises that is close to the water and petitioner's vessel-loading areas. The question presented is as follows:

Whether the rail line is part of an "adjoining area customarily used by an employer in loading [and] unloading * * * a vessel," and is thus a situs covered under Section 3(a) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 903(a).

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BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is unpublished, but the decision is noted at 209 F.3d 719 (Table). The decision and order of the Benefits Review Board (Pet. App. 3a-8a) is unreported. The decision and order of the administrative law judge (Pet. App. 9a-35a) is unreported.

JURISDICTION

The court of appeals entered its judgment on February 7, 2000. A petition for rehearing was denied on April 7, 2000 (Pet. App. 36a). The petition for a writ of certiorari was filed on July 6, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Longshore and Harbor Workers' Compensation Act (LHWCA or Act) provides compensation to covered employees for work-related injuries that result in disability, and to survivors if the injury causes death. 33 U.S.C. 908, 909. To be covered by the Act, an injured employee must meet two requirements. The first, commonly known as the "status" requirement, is that the employee must be engaged in maritime employment.[1] The second, known as the "situs" requirement, is that the injury must have occurred on a maritime situs. See *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 264-265 (1977). This case concerns the "situs" requirement, imposed by Section 3(a) of the Act, which specifies that a disability or death is compensable only if it

> results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

33 U.S.C. 903(a).

2. Petitioner Mobil Mining and Minerals operates a fertilizer manufacturing plant located along the Houston Ship Channel. Pet. App. 2a, 4a. Petitioner receives raw materials and ships out finished fertilizer products by barge and ship, and it maintains four docks

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[1] Section 2(3) of the Act defines "employee" (with certain exceptions not relevant here) as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker." 33 U.S.C. 902(3).

at the plant for loading and unloading vessels. *Id.* at 14a. Petitioner also receives raw materials and ships fertilizer products by truck and railway. *Id.* at 4a.

Respondent David Nixson worked as an "A Operator" in petitioner's shipping and receiving division. Pet. App. 12a-13a. His duties included a variety of tasks involving the loading and unloading of barges, and during 1993 he spent 41% to 50% of his work time engaged in those activities. *Id.* at 5a. His responsibilities also included tasks relating to the loading and unloading of trucks and rail cars. *Id.* at 5a, 17a. Respondent testified that he had a 50% daily expectation of working on the waterfront when barges were present or expected, and that at times he was reassigned during the course of a workday from the rail area of petitioner's facility to the waterfront. *Id.* at 13a-14a.

On the day of his injury, respondent was assigned to the locomotive crew, moving rail cars into position for loading. While attempting to couple cars together, he severely injured his left arm. Pet. App. 4a n.1, 20a. The record contains a map (without a scale) of petitioner's manufacturing plant, showing the site of respondent's injury. See CX 11 (Facility Map) (reprinted following Pet. App. 49a). The record does not, however, reflect the distance between the water and the site of the injury. Although petitioner states (Pet. 3) that the injury site is not "even near" its docks, in the court of appeals petitioner acknowledged that the pertinent rail line is "physically close to the water's edge," Pet. C.A. Br. 14, where its docks are located. See Facility Map. The rail line runs along the back, landward side of Building 9 (labeled "Fertilizer Storage" on the Facility Map) and a rock storage dome, which are structures used in the

loading and unloading of vessels. See *ibid.*; Pet. App. 14a, 20a.[2]

3. Respondent sought benefits under the LHWCA. His claim proceeded to a hearing before a Department of Labor administrative law judge (ALJ).[3] Pet. App. 12a. With respect to the Act's status requirement, the ALJ noted the parties' stipulation that the maritime duties of loading and unloading vessels constituted 41%-50% of respondent's assignments, and that respondent's uncontradicted and credible testimony established that he had a 50% daily expectation of being assigned to maritime work. See *id.* at 31a. The ALJ concluded on that basis that respondent satisfied the LHWCA's status requirement. *Ibid.*

The ALJ also determined that respondent was injured on an LHWCA situs. Pet. App. 25a-29a. Citing *Texports Stevedore Co.* v. *Winchester*, 632 F.2d 504, 513 (5th Cir. 1980) (en banc), cert. denied, 452 U.S. 905 (1981), the ALJ ruled that under Fifth Circuit precedent, the situs determination requires consideration of "all the circumstances." Pet. App. 27a. The ALJ focused in particular on factors derived from the decision in *Brady-Hamilton Stevedore Co.* v. *Herron*, 568 F.2d 137 (9th Cir. 1978) (Kennedy, J.).[4] He found that

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[2] Petitioner was injured near the juncture of two tracks. Tr. 109. One of the tracks runs behind buildings used in the vessel loading and unloading process; the other track runs along the waterway between those buildings and the docks. Facility Map; see Nixson Br. in Opp. 4.

[3] Petitioner paid respondent benefits under state compensation law, but respondent would be entitled to higher benefits under the LHWCA. Pet. App. 4a.

[4] Those factors are the particular suitability of the site for maritime uses referred to in the statute; whether adjoining properties are devoted primarily to maritime uses; the proximity of

petitioner's site on the Houston Ship Channel is suitable for its maritime receipt and shipment of materials, and was a "definite benefit" to petitioner; that petitioner's docks located on the waterway are connected to storage and manufacturing areas by conveyor belt systems; and that the facility arguably could not have been closer to the water. Pet. App. 27a. Based on those factors, the ALJ concluded that because petitioner's facility is in the vicinity of navigable waters and is used to load and unload vessels, it is a situs covered by the LHWCA. *Id.* at 27a-29a.

4. The Benefits Review Board affirmed. Pet. App. 3a-8a. The Board largely relied on its decision in *Gavranovic* v. *Mobil Mining & Minerals*, 33 Ben. Rev. Bd. Serv. (MB) 1 (1999), which held that a claimant in the same job classification as respondent at petitioner's Houston Ship Channel facility satisfied the Act's status and situs requirements. Pet. App. 6a-8a. The Board concluded that "[b]ecause the present case involves the same facility and the same employee classification and duties as the Board addressed in *Gavranovic*," respondent Nixson was entitled to LHWCA benefits "for the reasons set forth in *Gavranovic*." *Id.* at 7a.[5]

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the site to the waterway; and whether the site is as close to the waterway as is feasible given all the circumstances. Pet. App. 27a. Although the ALJ cited a Benefits Review Board decision as authority for the factors, see *ibid.* (citing *Arjona* v. *Interport Maint. Co.*, 31 Ben. Rev. Bd. Serv. (MB) 86, 87 (1997)), those criteria are derived from *Brady-Hamilton*. See 568 F.2d at 141.

[5] The Board in *Gavranovic* concluded that an "A" operator at the Houston Ship Channel facility was a maritime "employee" within the meaning of the Act (see note 1, *supra*) because he had regular involvement in the loading and unloading of vessels. Pet. App. 48a. The Board in *Gavranovic* also affirmed the ALJ's conclusion in that case that petitioner's entire facility is an

5. The court of appeals affirmed. Pet. App. 1a-2a. The court considered "the stipulated facts regarding both the particular site where the accident occurred and the surrounding area constituting Mobil's facility contiguous to the Ship Channel." *Id.* at 2a. The court concluded that "the 'area,' as distinguished from the pinpoint site of the accident, is a covered situs pursuant to the plain wording of § 903(a) of the LHWCA." *Ibid.*

ARGUMENT

The unpublished decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. Petitioner contends (Pet. 16-19) that even where significant portions of a manufacturing plant are customarily used in loading and unloading vessels, injuries that occur in other portions of the facility are not compensable under the LHWCA. That argument is incorrect. Section 3(a) of the Act provides that an injury to a covered worker is compensable if it takes place "upon the navigable waters of the United States," including an "adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel." 33 U.S.C. 903(a). As the Fifth Circuit has recognized, "[a]rea is a broad term" functionally defined, and the specific location of an injury need not be "customarily used" for loading or unloading if the broader area is. *Texports Stevedore Co.* v. *Winchester*, 632 F.2d 504, 515-516 (5th Cir. 1980) (en banc), cert. denied, 452 U.S. 905 (1981).

"adjoining area" that is "customarily used" for maritime purposes. *Id.* at 43a-47a.

In *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 279-281 (1977), this Court endorsed the use of a facility-wide approach to questions of LHWCA coverage. The Court explained that respondent Caputo satisfied the Act's situs requirement because

> [t]he truck he was helping to load was parked inside the terminal area. As [the employer] correctly concedes, this situs "unquestionably met the requirements of § 3(a) of the Act, . . . because the terminal adjoins navigable waters of the United States and parts of the terminal are used in loading and unloading ships."

Id. at 279. The Court employed the same mode of analysis in holding that respondent Blundo had been injured at a situs covered by the LHWCA. *Id.* at 279-281.[6] Consistent with that approach, the court of appeals in the instant case refused to give controlling significance to the customary use of the "pinpoint site of the accident," and looked instead to the wider facility in which respondent worked. Pet. App. 2a; see *Prolerized New England Co.* v. *Benefits Review Bd.*, 637 F.2d 30, 39 (1st Cir. 1980), cert. denied, 452 U.S. 938 (1981).[7]

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[6] Contrary to petitioner's contention (Pet. 12-13), the *Caputo* Court's endorsement of the facility-wide approach cannot plausibly be characterized as dictum. With respect to Caputo, the Court expressly agreed with the employer's concession that the situs requirement was satisfied "because the terminal adjoins navigable waters of the United States and parts of the terminal are used in loading and unloading ships." 432 U.S. at 279. The Court also made clear that the same analysis furnished an independent basis for its holding that Blundo was injured at a covered situs. *Id.* at 281.

[7] Cf. U.S. Dep't of Labor, Employment Standards Admin., *LHWCA Program Memorandum No. 58*, at 13-14 (Aug. 10, 1977) ("relevant 'area,' * * * is the entire maritime facility," and it

2. Focusing on the facility, rather than the precise location where the injury occurs, is supported by the purpose of the 1972 LHWCA amendments establishing the situs-and-status regime for coverage under the Act. Until 1972, the LHWCA extended coverage only to injuries that occurred "upon the navigable waters of the United States (including any dry dock)." 33 U.S.C. 903(a) (1970). As a result of that limitation on federal coverage and the disparity between the benefits payable under the Act and those provided under state workers' compensation laws, benefits awarded to longshore or harbor workers could vary substantially depending upon the side of the water's edge on which an accident occurred. See generally *Caputo*, 432 U.S. at 260-263; H.R. Rep. No. 1441, 92d Cong., 2d Sess. 10-11

"does not defeat coverage of a shipbuilder's injury that the precise location where it occurred—for example, a fabrication shop—does not itself adjoin the water; it suffices if the overall *area* within which it occurred (generally a shipyard) adjoins the water"); *Sidwell* v. *Express Container Servs., Inc.*, 71 F.3d 1134, 1140 n.11 (4th Cir. 1995) (under Section 3(a) "it is the parcel of land that must adjoin navigable waters, not the particular square foot on that parcel upon which a claimant is injured"), cert. denied, 518 U.S. 1028 (1996).

Under the facility-wide approach employed in *Caputo*, petitioner's facility meets the Section 3(a) criteria. It is located directly on the Houston Ship Channel and therefore "adjoin[s]" navigable waters under any conceivable standard. Compare *Texports Stevedore*, 632 F.2d at 514 (test is whether a site is "close to or in the vicinity of navigable waters, or in a neighboring area"), with *Sidwell*, 71 F.3d at 1138-1139 (test is whether a site is " 'contiguous with' or otherwise 'touches' such waters"). In addition, petitioner engages in extensive maritime activity through loading and unloading of vessels, Pet. App. 15a-18a, thereby meeting the requirement that the area be "customarily used" for maritime purposes.

(1972); S. Rep. No. 1125, 92d Cong., 2d Sess. 12-13 (1972).

Congress amended the Act in 1972, Pub. L. No. 92-576, § 2, 86 Stat. 1251, extending its coverage to specified landward locations and to "other adjoining area[s] customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel." 33 U.S.C. 903(a). That expansion of coverage to "rather large shoreside areas," *Herb's Welding, Inc.* v. *Gray*, 470 U.S. 414, 423 (1985), was designed to "permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity." H.R. Rep. No. 1441, *supra*, at 10-11; S. Rep. No. 1125, *supra*, at 13. Section 3(a) should therefore be construed so as to minimize the frequency with which individual workers walk in and out of coverage. See *Triguero* v. *Consolidated Rail Corp.*, 932 F.2d 95, 101 (2d Cir. 1991); *Prolerized*, 637 F.2d at 39; *Texports Stevedore*, 632 F.2d at 514-515; *Brady-Hamilton Stevedore Co.* v. *Herron*, 568 F.2d 137, 140-141 (9th Cir. 1978).

A facility-wide approach to the term "area" serves that purpose. By contrast, limiting the LHWCA's coverage to the component areas of a facility where loading or unloading occurs would cause workers like respondent Nixson, who regularly work in both vessel and rail loading areas, to shift frequently between LHWCA and state coverage. As the ALJ in this case emphasized, "to conclude that a worker like [respondent Nixson], who spends 50% of his work time loading and unloading barges and vessels, is covered only if he is injured while engaged in such maritime activity

would accentuate the 'walking in and out of coverage' that Congress intended to eliminate." Pet. App. 29a.[8]

3. Contrary to petitioner's contention (Pet. 14), this Court's decision in *Herb's Welding* does not cast doubt on the continuing vitality of the *Caputo* Court's analysis. The Court in *Herb's Welding* did observe in passing that under the LHWCA, "there will always be a boundary to coverage, and there will always be people who cross it during their employment." 470 U.S. at 426. The Court's holding in the case, however, was that the worker in question was not engaged in maritime employment. *Id.* at 421-426. In light of that disposition of the "status" question, the Court explained that it "need not determine whether [the worker] satisfied the Act's situs requirement." *Id.* at 427. Because petitioner does not contest the Benefits Review Board's determination that respondent Nixson satisfied the Act's status requirement, see Pet. App. 2a (noting that petitioner conceded the point in the court of appeals), *Herb's Welding* is essentially irrelevant to the question presented for this Court's review.[9]

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[8] The 1972 amendments also imposed a new "status" requirement by amending the Act's definition of "employee." Because Congress did not wish to extend coverage to all workers who might be injured in the newly covered landward areas, it limited the Act's coverage to "person[s] engaged in maritime employment." 33 U.S.C. 902(3); see note 1, *supra*. In the context of this case, the status requirement would ensure that employees whose work extends only to manufacturing (rather than maritime) activities would not be covered by the LHWCA, even if they are injured while working within a maritime situs.

[9] The loading and unloading of vessels constituted 41%-50% of respondent Nixson's work assignments. Pet. App. 5a. By contrast, the individual whose claim was at issue in *Herb's Welding* was a welder whose "work had nothing to do with the loading or unloading process." 470 U.S. at 425.

4. Petitioner contends (Pet. 9-11) that the court of appeals' decision in this case conflicts with the decision of the Fourth Circuit in *Jonathan Corp.* v. *Brickhouse*, 142 F.3d 217, cert. denied, 525 U.S. 1040 (1998). That claim is incorrect.

In holding that the claimant in *Brickhouse* had not satisfied the LHWCA's situs requirement, the Fourth Circuit explained:

> At the time of his employment, Brickhouse was fabricating steel parts for an inland bridge in North Carolina. He was fabricating them in a steel fabrication plant which was not a pier, wharf, dry dock, terminal, building way, or marine railway. Nor was it, we conclude, a similar type of facility that fits the catchall provision. While at the plant, the employees' work did not routinely take them from within the plant, onto adjoining water, and back again into the plant. On the contrary, when at the plant, their work kept them in the plant to fabricate steel components that were shipped from the plant, usually by rail or truck, either to an inland site or to a ship on navigable waters for installation. The very fact that it was necessary for the components to be shipped from the plant before their installation, whether by ship or not, provides the fact that insulates the plant from navigable waters and distinguishes Brickhouse's work location from that of the traditional longshoreman's workplace at the water's edge. When Brickhouse worked on ships, which he occasionally did, he traveled by land to the shipyards where he then installed fabricated parts. During these times, he was undoubtedly on a situs covered by the LHWCA. But while at the Tidewater Steel plant, his situs was no different than it

> would have been at any steel fabrication plant anywhere in the land.

142 F.3d at 222. The court noted as well that "the plant was almost a thousand feet from the water's edge, and it was not 'customary' for the plant's workers to move between land and water in any regular way." *Ibid.* The Fourth Circuit's analysis clearly assumes that application of Section 3(a)'s "other adjoining area" provision turns on the customary uses of the facility as a whole—not on whether the specific location of a claimant's injury is typically used for the loading, unloading, or building of vessels. Indeed, although the Fourth Circuit observed in passing that "[a]t the time of his injury, Brickhouse was working in a non-maritime bay of the plant," *id.* at 219, the specific location of the claimant's injury within the larger facility played no role in the court's resolution of the situs question.

The apparent thrust of the Fourth Circuit's opinion in *Brickhouse* is that *no* part of the relevant facility was "customarily used" for the loading, unloading, or building of vessels. Thus, the court explained that "the fact that components were, on rare occasions, shipped by barge from Tidewater Steel's dock is not meaningful. The barge dock on Tidewater Steel's property would be relevant only if barges were its 'customary' method of shipment and if its employees were longshoremen who customarily loaded the barge at the facility." 142 F.3d at 222. Since portions of petitioner's facility in this case are customarily used for loading and unloading vessels (see notes 5 & 7, *supra*), the Fifth Circuit's decision in this case is not in conflict with Fourth Circuit precedent. See Pet. App. 45a n.7 (Benefits Review Board concludes that the Fourth Circuit's approach "would not dictate a contrary result in [*Gavranovic*], as [peti-

tioner's] facility actually adjoins navigable waters and is used for loading and unloading vessels"); cf. *Sidwell*, 71 F.3d at 1140 n.11 (Fourth Circuit states that "it is the parcel of land that must adjoin navigable waters, not the particular square foot on that parcel upon which a claimant is injured").[10]

5. Petitioner contends (Pet. 20) that this Court was "poised to clarify the meaning of the 'customarily used' standard when it granted certiorari" in *Brooker* v. *Durocher Dock & Dredge*, 133 F.3d 1390 (11th Cir.), cert. granted, 524 U.S. 982, cert. dismissed, 525 U.S. 957 (1998), but was deprived of the opportunity when the parties settled that case. *Brooker*, however, presented the question whether a seawall under construction was a covered situs. The petition for a writ of certiorari contended that the seawall in question was a "pier" within the meaning of Section 3(a), and that the Eleventh Circuit's contrary ruling conflicted with *Fleischmann* v. *Director, OWCP*, 137 F.3d 131 (2d Cir.), cert. denied, 525 U.S. 981 (1998), which held that a bulkhead was a "pier." 98-18 Pet. at 6, 10-11. The petition also argued that the seawall was an area customarily used for loading and unloading vessels, based on

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[10] Although the Fourth Circuit in *Brickhouse* stated that "the steel fabrication plant where Brickhouse was injured was not a facility, the *raison d'etre* of which is its use in connection with the nearby navigable waters," 142 F.3d at 222 (internal quotation marks omitted), that assertion was in no way central to the court's analysis. And while the "*raison d'etre*" of petitioner's facility is not maritime in nature, the strong maritime connection between the facility and the water justifies its treatment as an LHWCA situs. See Pet. App. 15a, 27a (describing the large amount of raw materials that petitioner receives by vessel, the suitability of the site for such receipt, and the benefit petitioner receives from its waterfront location).

evidence that materials for the seawall's construction were regularly loaded and unloaded in the vicinity of the seawall. *Id.* at 13-14. Neither the Eleventh Circuit nor the petition for certiorari discussed the question whether the customary use of a portion of a manufacturing plant for loading and unloading vessels satisfies the LHWCA's "situs" requirement with respect to injuries that occur in other portions of the plant. The question on which this Court granted certiorari in *Brooker* is therefore largely unrelated to the question presented in the instant case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2000

Supreme Court, U.S.
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(5)

No. 00-44

IN THE

Supreme Court of the United States

MOBIL MINING & MINERALS,

Petitioner,

v.

DAVID R. NIXSON AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

1. This Case Presents An Important Question, On Which The Circuits Are Split, Concerning The Scope Of Coverage Under The LHWCA.

If a manufacturing facility includes a dock that is customarily used for unloading raw materials or loading finished products, the dock is unquestionably a covered situs under § 3(a) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 903(a). The issue in this case is whether the existence of a dock transforms the *entire* manufacturing facility into an "area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel." *Id.* In the First and Fifth Circuits, if *part* of a manufacturing facility is used for loading and unloading vessels, the *entire facility* is deemed a covered situs. *See* Pet. App. 47a ("Although [Petitioner's] facility ... is a manufacturing operation, ... *part* of employer's business involves sending and receiving goods by barges or vessels ....") (emphasis added); *see also Prolerized New England Co. v. Benefits Review Bd.*, 637 F.2d 30, 39 (1st Cir. 1980) (holding, based on "considerations of policy," that an entire manufacturing facility is a covered situs). In the Fourth Circuit, in contrast, the entire facility qualifies as an "area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel" only if it is "like a 'pier,' 'wharf,' 'dry dock,' 'terminal,' 'building way,' or 'marine railway'": that is, if it is "a discrete structure or facility, the very raison d'etre of which is its use in connection with navigable waters." *Sidwell v. Express Container Servs., Inc.*, 71 F.3d 1134, 1139 (4th Cir. 1995); *see also Jonathan Corp. v. Brickhouse*, 142 F.3d 217, 221 (4th Cir. 1998). Certiorari is warranted to resolve this conflict among leading maritime-law circuits.

This issue is plainly important. Indeed, Respondents concede as much. *See* Nixson Br. In Opp. 10 ("Petitioner is correct in stating that this is an important issue"). The importance of the issue is underscored by the *amicus* brief of the Maritime Law Association in support of the Petition. The MLA, an association of thousands of admiralty lawyers who represent "the

full gamut of maritime interests" (including the interests of longshore workers), takes no position on the merits, but urges the Court to grant review to resolve the conflict. MLA Br. 1, 7. As the MLA points out, manufacturing and refining facilities often are built along navigable waterways. Many such facilities cover an extensive geographical area, only a small part of which is devoted to loading and unloading vessels. MLA Br. 5-6.[1]

Apart from its practical importance, the issue in this case is significant because it concerns the appropriate boundary between federal and state authority. Where the LHWCA applies, it frequently displaces State workers' compensation regimes.[2] Extending coverage under the LHWCA to entire manufacturing and refining facilities significantly interferes with the States' traditional authority to enact and administer workers' compensation laws. Where Congress has not expressed a clear

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[1] There is no question that Petitioner's facility is a manufacturing plant. *See* Pet. App. 4a ("Employer is a fertilizer manufacturer"); *id.* at 12a ("Employer is a manufacturer of industrial fertilizer."); *id.* at 47a ("[T]he facility ... is a manufacturing operation"); *see* Fed. Br. in Opp. i, 2 (Petitioner "operates a manufacturing plant"). Although the facility includes four dock areas (not five, as Respondent Nixson asserts, *see* Pet. App. 14a), most of the facility is used for non-maritime manufacturing operations. Respondent Nixson was injured on railroad tracks that are not used in connection with loading or unloading vessels, and that are separated from the waterfront by a road, several large buildings, and a storage tank. *See* Pet. App. 20a; Exh CX-11 (plant map, reprinted following Pet. App. 49a. The plant map includes a scale (1" = 100'). The record also includes 44 photographs and a video of the facility. *See* Pet. App. 18a.)

As a practical matter, it would not be difficult to distinguish areas of a manufacturing facility used to load and unload ships from areas used for non-maritime purposes. *See, e.g.*, 29 C.F.R. § 1917.2 (defining "marine terminal" to exclude "production or manufacturing areas").

[2] Although the LHWCA and state workers' compensation remedies are not mutually exclusive, *see Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 719-20 (1980), the LHWCA tends to supplant state workers' compensation laws in many States because workers naturally seek the highest level of benefits available to them.

intent to supplant state law – and particularly where it has clearly expressed an intent to achieve a more limited result – the federal courts should not displace state law as a matter of "liberal construction."

2. The 1972 Amendments To The LHWCA Do Not Prevent Workers From "Walking In And Out Of Coverage."

Respondents defend the expansive interpretation of the First and Fifth Circuits on the ground that Congress intended to eliminate situations in which employees "walk in and out of coverage." *See* Fed. Br. in Opp. 8-10; Nixson Br. in Opp. 10-11. Respondents' argument is contrary to the plain statutory language, the legislative history, and this Court's decisions.

As explained in the Petition (at 7-8, 17-19), Congress amended § 3(a) in response to *Nacirema Operating Co. v. Johnson*, 396 U.S. 212 (1969), which held that LHWCA coverage "stopped at the water's edge." *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 259 (1977). If Congress had intended to cover maritime workers injured anywhere on the employer's property, it easily could have said so. Instead, Congress chose quite different language to address the specific problem identified in *Nacirema*: "Congress intended that a worker's eligibility for federal benefits would not depend on whether he was injured while walking down a gangway or while taking his first step onto the land." *P.C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69, 75 (1979). In expanding the scope of the LHWCA "to cover injuries occurring in the contiguous dock area," S. Rep. No. 92-1125, at 2 (1972), Congress did not intend to eliminate the phenomenon of workers walking in and out of coverage. To the contrary, as this Court recognized in *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 426-27 (1985), the LHWCA "draws a clear geographical boundary that will predictably result in workers moving in and out of coverage.... [T]here will always be a boundary to coverage, and there will always be people who cross it

during their employment. If that phenomenon was enough to require coverage, the Act would have to reach much further than anyone argues it does or should."[3]

3. The Fifth Circuit's Decision Perpetuates A Circuit Conflict.

The Petition explains (at 7-11) that the courts of appeals have reached very different conclusions concerning the proper interpretation of § 3(a) of the LHWCA. In the First and Fifth Circuits, an entire manufacturing facility is considered a covered situs if *part* of the facility (such as a dock) is used for loading and unloading vessels. The Fourth Circuit rejected this interpretation of § 3(a) in *Brickhouse*. The facility at issue in that case, like Mobil's fertilizer plant, adjoined a navigable waterway and "ha[d] a dock for loading barges." 142 F.3d at 219. The Fourth Circuit declined to hold, however, that because the facility included a dock, the entire facility should be deemed to be "customarily used" for loading and unloading vessels. The Fourth Circuit reasoned that the areas expressly enumerated in § 3(a) – piers, wharves, dry docks, terminals, building ways, and marine railways – are all "'discrete structure[s] or facilit[ies]'" that are "customarily used by longshoremen in loading and unloading ships and in repairing or building them." *Id.* at 221 (quoting *Sidwell*, 71 F.3d at 1139). Applying the *ejusdem generis* principle, the Fourth Circuit held that the "other area[s]" referred to in § 3(a)'s catch-all clause likewise "must be for the loading or unloading of cargo onto ships in navigable waters or for the 'repairing, dismantling, or building' of those ships." *Id.* *See also Sidwell*, 71 F.3d at 1139 ("an 'other adjoining area' ... must be like a 'pier,' 'wharf,' 'dry dock,' 'terminal,' 'building way,' or 'marine railway.'"). Accordingly, the Fourth Circuit held, an "other adjoining area" that is not

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[3] Although the Solicitor General dismisses *Herb's Welding* as "essentially irrelevant" to the question in this case (Fed. Br. in Opp. 10), the Fourth Circuit disagrees. In *Brickhouse*, the Fourth Circuit expressly relied on the above-quoted passage from *Herb's Welding* in declining to extend coverage to entire manufacturing facilities. *See* 142 F.3d at 220.

enumerated in § 3(a) must be "a discrete structure[] or facilit[y], the very raison d'etre of which is [its] use in connection with navigable waters." *Brickhouse*, 142 F.3d at 221 (quoting *Sidwell*, 71 F.3d at 1139).

Although Respondents deny that there is a conflict between the Fourth Circuit, on the one hand, and the First and Fifth Circuits on the other, a conflict plainly exists. *See Sidwell*, 71 F.3d at 1137, 1138 (observing that the Fifth Circuit "effectively eliminated the situs requirement" in *Texas Stevedore Co. v. Winchester*, 632 F.2d 504 (5th Cir. 1980) (*en banc*), and declining to adopt tests applied by the Fifth Circuit and other circuits because they do not "even purport[] to follow the language of the statute"); Pet. App. 26a-27a (contrasting the "Fourth Circuit's restrictive construction of the situs requirement" with the construction of "the Fifth Circuit, within whose appellate jurisdiction this case arises"); *id.* at 44a-45a ("[w]e decline to impose the more restrictive law established by the ... Fourth Circuit ..., as the Fifth Circuit law is controlling."); MLA Br. 6-7 (concluding that there is a conflict).

The Solicitor General contends (Fed. Br. in Opp. 12) that the Fourth Circuit's decisions in *Brickhouse* and *Sidwell* "assume[] that application of Section 3(a)'s 'other adjoining area' provision turns on the customary uses of the facility as a whole." That is a misreading of *Sidwell* and *Brickhouse*. Both those decisions hold that an "other adjoining area," to be covered under § 3(a), must be like a pier or wharf: that is, a "discrete structure or facility" the "very raison d'etre of which is its use in connection with navigable waters." *Brickhouse*, 142 F.3d at 221; *Sidwell*, 71 F.3d at 1139. Under the Fourth Circuit's approach, it is plainly not the case that a facility consisting of several "discrete structure[s]" must be covered in its entirety or not at all. Nor is an entire facility covered if it contains any "discrete structure" that is used in connection with the water.

The Solicitor General also suggests, somewhat tentatively, that "[t]he apparent thrust" of the Fourth Circuit's analysis in *Brickhouse* "is that *no* part of the relevant facility was 'customarily used' for loading, unloading, or building vessels." Fed. Br. in

Opp. 12. That is also an untenable reading of *Brickhouse*. Apart from the fact that a substantial part of the facility in *Brickhouse* was used to build ship components, that facility – like Petitioner's facility – included a dock. The Fourth Circuit did not conclude, or even suggest, that an employee injured in the dock area while loading or unloading a barge would not be covered under the LHWCA. Any such conclusion would have created a conflict with at least one court of appeals' decision holding (in accordance with this Court's suggestion in *Caputo*) that a structure such as a pier or wharf that is actually enumerated in § 3(a) is covered without regard to whether it is "customarily used" for loading or unloading vessels.[4]

The Solicitor General ultimately acknowledges (in a footnote) the Fourth Circuit's conclusion in *Brickhouse* that the raison d'etre of the steel fabrication facility was not use in connection with navigable waters. *See* Fed. Br. in Opp. 13 n.10. Although the Solicitor General asserts, without explanation, that this conclusion was not "central" to the Fourth Circuit's analysis, the Fourth Circuit's opinion is to the contrary. The opinion concludes that the employee was injured "in a steel fabrication plant which was not a pier, wharf, dry dock, terminal, building way, or marine way," and was not "a similar type of facility that fits the catchall provision." 142 F.3d at 222. "Stated otherwise," the Fourth Circuit concluded, "the steel fabrication plant ... was not a facility, the 'raison d'etre of which is its use in connection' with the nearby navigable waters." *Id.* (quoting *Sidwell*, 71 F.3d at 1139).

Respondent Nixson points to the Fourth Circuit's statements in *Brickhouse* that the employees' work kept them in

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[4] *See, e.g., Hurston v. Director, OWCP*, 989 F.2d 1547, 1547-48 (9th Cir. 1993). Moreover, there is no indication that the dock in *Brickhouse* was used for any purpose other than loading vessels. An area that is used *exclusively* for loading vessels may be said to be "customarily used" for that purpose. (*E.g.*, if a platter is used only once a year to serve the Thanksgiving turkey, it may be said to be "customarily used" for that purpose.)

the plant to fabricate steel, rather than taking them onto adjoining water and back again. 142 F.3d at 222; *see also id.* (fact that the fabrication plant was located on the water was "fortuitous" in the sense that workers "remained in the plant fabricating maritime and non-maritime components"). The Fourth Circuit's statements were addressed to an aspect of the facility at issue in *Brickhouse* that made it *more* likely than Petitioner's facility to be viewed as a covered situs: namely, the *Brickhouse* facility fabricated ship components. The Fourth Circuit concluded that, because there was no evidence that ships were ever repaired, dismantled, or built at the facility's barge dock, the fact that the facility manufactured ship components did not make it a covered situs. In contrast, the facility at issue in this case manufactures fertilizer, not ship components. Moreover, although some employees at Petitioner's fertilizer plant do load and unload vessels, most of its employees are like those in *Brickhouse*: their work keeps them in the manufacturing areas of the facility.

Respondent Nixson also suggests that the Fourth Circuit would have decided this case the same way as the Fifth Circuit because approximately 16% of Petitioner's finished products are shipped by barge, and Petitioner also receives some raw materials by barge. Nixson Br. in Opp. 13; Pet. App. 20a n.5. That suggestion is unpersuasive. The *Brickhouse* facility also shipped finished products by barge from time to time. 142 F.3d at 218. Moreover, the Fourth Circuit, adhering closely to the statutory text, limited the scope of an "other adjoining area" to discrete structures or facilities that are like a pier or wharf, in the sense that their rasion d'etre is use in connection with the water. The raison d'etre of a fertilizer plant is to manufacture fertilizer, not to load and unload vessels. That would be so even if 100% of the raw materials arrived at the manufacturing facility by barge and 100% of the finished products left by barge.[5]

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[5] If coverage of manufacturing facilities under the LHWCA depended on the percentage of materials that are shipped by rail, truck, or barge, entire facilities would shift unpredictably in and out of coverage.

4. Many Of Respondents' Arguments Fail To Address The Question Presented.

Many of Respondents' arguments do not even address the question presented, but go instead to related but distinct issues concerning the scope of the LHWCA. For example, Respondents contend that "the specific location of an injury need not be 'customarily used' for loading or unloading if the broader area is." Fed. Br. in Opp. 6; Nixson Br. in Opp. 9. Even assuming that is so, the site of the injury must be within a larger area that *is* customarily used for loading or unloading vessels. The question in this case is whether an entire manufacturing facility may be deemed to be an area that is customarily used for loading and unloading vessels, simply because a small part of the facility is used for that purpose.

Respondents also contend that an area may be "customarily used" to load and unload vessels even if it is not *exclusively* used for that purpose. Again, even assuming that is so, it does not answer the question presented in this case. Most of Petitioner's fertilizer manufacturing plant is *never* used for loading or unloading vessels. It thus cannot be said that the entire facility is like a pier or a wharf, in the sense that its raison d'etre is to load and unload vessels.

Respondents also point to the Fourth Circuit's statement in *Sidwell* that "it is the parcel of land that must adjoin navigable waters, not the particular square foot on that parcel upon which the Claimant was injured." *Sidwell*, 71 F.3d at 1140 n.11. But that statement addresses the question whether an area "adjoins" navigable waters, not whether the area is "customarily used" for loading and unloading ships. Moreover, in the example given by the Fourth Circuit, the injury occurred in a shipyard. *See id.* The raison d'etre of a shipyard is to build ships, and therefore an entire shipyard might well be a covered situs under the Fourth Circuit's interpretation of § 3(a). But the Fourth Circuit's statement provides no support for the conclusion that if a manufacturing facility contains a dock, the entire facility is customarily used for loading and unloading vessels.

5. The Lower Court's Uncertainty About The Scope Of This Court's Prior Decisions Provides An Additional Reason to Grant Review.

Contrary to the Solicitor General's assertion (Fed. Br. in Opp. 7), this Court did not "endorse[ ] ... a facility-wide approach to questions of LHWCA coverage" in *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249 (1977). First, the injury in *Caputo* took place in a terminal, and the Court strongly suggested that the phrase "customarily used" does not "modify ... preceding terms" such as "terminal." 432 U.S. at 281. Second, one of the two employers in *Caputo conceded* that the situs requirement was satisfied and the other made only a "halfhearted" argument, so it is hardly surprising that the Court accepted the concession at face value. *Id.* Third, subsequent decisions of this Court have cast doubt on any suggestion that a manufacturing facility is covered in its entirety merely because it includes a dock. Those decisions not only emphasize the "controlling principle" that courts must give effect to clear statutory language, *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992), but also expressly recognize that § 3(a) creates a "boundary to coverage, and there will always be people who cross it during their employment." *Herb's Welding*, 470 U.S. at 426.[6]

Caputo nevertheless provides an additional reason to grant the petition. As explained in the Petition (at 11-15), at least one court of appeals has adopted a broad interpretation of § 3(a) based in part on language in this Court's decision in *Caputo*. *See Prolerized*, 637 F.2d at 39. The Fourth Circuit, however, does not regard *Caputo* as controlling. *See Sidwell*, 71 F.3d at 1136 n.2. The fact that the disagreement in the circuits arises in part over

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[6] In addition, the Court has emphasized that the status and situs requirements are distinct, and that neither should be interpreted to render the other superfluous. *Herb's Welding*, 470 U.S. at 426. If the employer's entire facility meets the situs test whenever any part of its facility is customarily used for loading or unloading vessels, the situs test is rendered largely superfluous. *See Sidwell*, 71 F.3d at 1137, 1138 (Fifth Circuit has "effectively eliminated the situs requirement").

uncertainty about the meaning of one of this Court's decisions provides an added reason for this Court to resolve the disagreement.[7]

CONCLUSION

The petition for a writ of certiorari should be granted.

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October 2000

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[7] The Solicitor General asserts (Fed. Br. in Opp. 14) that "[t]he question on which this Court granted certiorari in" *Brooker v. Durocher Dock & Dredge*, 133 F.3d 1390 (11th Cir.), *cert. granted*, 524 U.S. 982 (1998), was "largely unrelated to the question presented in the instant case." As the Solicitor General acknowledges, however, *Brooker* presented the questions whether the seawall at issue in that case was a "pier" within the meaning of § 3(a) *or* an "area customarily used for loading and unloading vessels." Fed. Br. in Opp. 13. Thus, *Brooker*, like this case, presented an opportunity for the Court to clarify the meaning of the "other adjoining area" clause of § 3(a).